SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 697.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

INDEX.

a In the district court for the District of Alaska, division number one, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.

John Rustgard, U. S. attorney, attorney for plaintiff.

Bogle, Graves, Merritt & Bogle and R. A. Gunnison, attorneys for defendants Pacific and Arctic Railway and Navigation Company, a corporation, and F. B. Wurzbacher.

Shackleford & Bayless and Farrell, Kane & Stratton, attorneys for defendants Pacific Coast Steamship Company, a corporation, and E. C. Ward, J. C. Ford, and G. H. Higbee.

W. H. Bogle and Winn & Burton, attorneys for defendants Alaska Steamship Company, a corporation, J. H. Bunch, and J. H. Young.

R. A. Gunnison, attorney for defendants Canadian Pacific Railroad Company, a corporation, and C. E. Wynn Johnson.

Ira Bronson and R. A. Gunnison, attorneys for defendants The North Pacific Wharves and Trading Company, a corporation, Ira Bronson, and Charles E. Peabody.

1 In the United States district court for the District of Alaska, division number one.

Indictment.

UNITED STATES OF AMERICA
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher.

The grand jurors of the United States of America in the United States District Court for the District of Alaska, division number one,

at Juneau, at the regular term of said court, held at Juneau, in said district and division, beginning January 3rd, A. D. 1912, duly selected, empaneled, sworn, and charged according to law, accuse the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher of crimes against the United States, committed as follows:

2 COUNT ONE.

The grand jurors aforesaid, upon their oaths aforesaid, do present that continuously and at all times during the last ten years, and therefore continuously and at all times during the last three years next preceding the finding and presentation of this indictment, in division number one of the District of Alaska, and within the jurisdiction of this court, the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, the North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, hereafter to be referred to as the defendants, did wrongfully, unlawfully, knowingly, and willfully engage in a combination and conspiracy in restraint of trade and commerce, by then and there combining and conspiring with one another to eliminate from and destroy competition in the business of transporting freight and passengers between the various ports in the United States and British Columbia in the south, and the various cities, communities, and settlements in the valleys of the Yukon River and of its tributaries, both in British and American territory in the north, by way of Lynn Canal, and intermediate points on a line of traffic hereinafter to be described, for the purpose and with the intent of monopolizing such trade and commerce in manner and form and by the means herein after set out; said Pacific and

3 Arctic Railway and Navigation Company being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of West Virginia, the Pacific Coast Steamship Company being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the State of California, the Alaska Steamship Company being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the State of Nevada, the Canadian Pacific Railroad Company being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the Dominion of Canada, and The North Pacific Wharves and Trading Company

being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the State of Washington; that during all the time herein mentioned the said Pacific Coast Steamship Company and the said Alaska Steamship Company have severally been and were operating a several line of steamships as common carriers of passengers and freight, running in regular route between Seattle, in the State of Washington, and Skagway, in the District of Alaska, and during all said time the said Canadian Pacific Railway Company has been and was operating a line of steamships as common carriers of passengers and freight between Vancouver, in British Columbia, and Skagway, in Alaska, the said three last-named transportation companies to be hereafter referred to as the Steamship Companies; that during all the
4 time herein mentioned the Pacific and Arctic Railway and Navigation Company owned and operated a railroad from tidewater at Skagway, in the District of Alaska, to the summit of White Pass, a distance of, approximately, twenty miles, to the boundary line between Alaska and British Columbia, and at which latter point it connected with a railroad owned and operated by British Columbia Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Province of British Columbia, which latter railroad extended from the said point at the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and the Yukon District of Canada, a distance of, approximately, twenty miles, and at which latter point said railroad connected with another railroad owned and operated by British Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and which latter railroad extended from said point at the east shore of Lake Bennett to White Horse, on the headwaters of the Yukon River, in Yukon district of Canada, and that during all the time herein mentioned there has been and was a line of steamships plying upon the Yukon River and the headwaters thereof between White Horse and Dawson, owned and operated by British Yukon Navigation Company, a corporation; that said four corporations last above mentioned and the stocks and bonds of the same were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers last mentioned were under one and the same management and operated as one continuous line of common carriers of freight and passengers in interstate commerce between said towns of Skag-
5 way and Dawson and way-points, under the name and style of White Pass and Yukon Route, hereafter to be referred to as the railroad, and as such were used and operated to transport and convey merchandise, commodities, live stock, general freight, and passengers for hire between said points, and that during all the time herein mentioned the said railroad had the sole and exclusive monopoly on the said transportation business between Lynn Canal and the navigable waters of the Yukon River; that during all the

time herein mentioned a general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, and large quantities of merchandise, commodities, and general freight, as well as large numbers of passengers, were during all such times transported from various ports of the United States, chiefly from the port of Seattle, in the State of Washington, and from various ports in British Columbia, chiefly the ports of Victoria and Vancouver, hereafter to be referred to as the southern ports, to White Horse, Dawson, Eagle, Circle, Rampart, Fairbanks, and other cities, communities, and settlements on the Yukon River and on its tributaries, both in British and American territory, and the most natural and the shortest route for such trade, transportation, traffic, and commerce during all the time herein mentioned, was, has been, and is, by water craft from said southern ports, to Skagway, at the head of Lynn Canal, Alaska, thence over the Moore Wharf, so called, hereafter described, thence over said railroad to the navigable waters of the Yukon, and thence down the Yukon by water craft to
6 points of destination, while south-going trade, commerce, and transportation from the said various cities, communities, and settlements on the Yukon River and on its tributaries would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river, thence by way of said railroad to Skagway, Alaska, thence over the said Moores Wharf, and thence by steamships or other water craft to the said southern ports; that during all the time herein mentioned The North Pacific Wharves and Trading Company was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at which steamships or other water craft could dock and discharge or load cargo, said corporation having during all such time complete and absolute monopoly on the wharfinger business at Skagway, and owned and operated at that port a wharf known and designated as Moores Wharf, which said wharf had, by agreement between said railroad and said The North Pacific Wharves and Trading Company been made, and during all the time herein mentioned, pursuant to such agreement, was the southern terminus of said railroad and over which wharf all freight going to or coming from or passing through Skagway had necessarily to pass, which said wharf was, during all the time herein mentioned, by the said The North Pacific Wharves and Trading Company operated as a public wharf.

And the grand jurors, upon their oaths aforesaid, do say: That continuously during the three years immediately preceding the finding and presentation of this indictment the said defendants
7 aforenamed combined and conspired together to eliminate from and to destroy competition in the said transportation business between said southern ports and Skagway, Alaska, for the purpose and with the intent of giving to and creating for the Alaska Steamship Company, the Pacific Coast Steamship Company, and the Canadian Pacific Railroad Company a monopoly of the said trans-

portation business betwen said southern ports and Skagway, Alaska, and to that end, for that purpose, and with that intent, a joint through traffic arrangement was entered into and continuously during said period maintained, by and between the said railroad and the said steamship companies, by and through the aforementioned individual defendants, the latter acting as officers and agents of said defendant corporations, pursuant to which arrangement either of said steamship companies might, could, and did bill freight and passengers through from either of said southern ports to any point on the said railway or on said Yukon River or tributaries thereof along the aforementioned route of travel and transportation, while the said railroad would and did bill freight and passengers through from said Yukon or other northern points on said route of travel to said southern ports only on ships from Skagway south belonging to either of said steamship companies, and, with the intent and purpose aforesaid, rates of transportation for freight and passengers between said southern ports and the various points along said railway and on the Yukon and tributaries were fixed by defendants herein for such joint through traffic and through billing of freight and passengers as aforesaid, and an apportionment between the
8 said connecting carriers of the gross receipts for such through shipments was by defendants established and agreed upon; and it being further agreed and arranged by and between said defendants, for the same unlawful purpose and with the same unlawful intent, that the said railroad should, and accordingly during all the time herein mentioned it did, refuse to enter into any such joint through traffic arrangement with any other carrier or carriers, save the said corporate members of said combination and conspiracy aforesaid, and refuse to receive any other through billing on shipments from said southern ports except such as arrived at Skagway by some ship belonging to one of the said steamship companies, and refuse to bill freight or passengers through from said Yukon points to said southern ports except by ships belonging to either of said steamship companies from Skagway south, and, for the same unlawful purpose and with the same unlawful intent, and as part of the same combination and conspiracy, it was arranged and agreed by and between the defendants herein that the said The North Pacific Wharves and Trading Company should, and it accordingly during all the time herein mentioned did, charge wharfage at the rate of two dollars ($2.00) per ton for all freight handled over its said wharf, the Moores Wharf, except when the same was shipped on some vessel belonging to either of said steamship companies and was consigned to some one who had entered into, or was about to enter into, a contract with either of said steamship companies to bind himself to
9 have all his shipments of freight carried by such steamship company and by no one else, and in which latter case a wharfage of one dollar ($1.00) per ton only was charged, the said wharfage of two dollars ($2.00) per ton and any and all wharfage in excess of one dollar ($1.00) per ton being at all the time herein

mentioned unreasonably high, and was charged and exacted for the unlawful purpose aforesaid; and with the intent and for the purpose aforesaid, and as a part of the same combination and conspiracy, it was arranged and agreed by and between the said defendants during all the time herein mentioned that the said railroad should, and it accordingly at all times herein mentioned did, fix and establish transportation charges for freight and passengers on said railroad between Skagway and Yukon points at much higher rates than the aforementioned rates established by defendants for said through shipments between said southern ports and the said Yukon points, such local rates, so called, being from five per cent to twenty-five per cent higher than the said joint through rates, differing according to classification of the various commodities shipped; and, pursuant to such arrangement, and for the purpose and with the intent aforesaid, the said railroad received for said through shipments, as its share of the freight charges, from fifteen to thirty per cent less than it charged as aforesaid for the same class of freight shipped between Skagway and the same Yukon points; by reason of which facts aforesaid, it became and was, during all the time herein mentioned, unprofitable for the public to employ any carrier in
10 said trade, traffic, and commerce save and except said steamship companies, and competition in said water transportation aforesaid between said steamship companies and other carriers being in that manner and by that means by said combination and conspiracy, during all the time herein mentioned, eliminated and destroyed, the defendants herein were enabled during all such time to monopolize said trade, traffic, transportation and commerce, to the injury of the public.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say: That the said defendants, Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, are guilty of engaging in a combination and conspiracy in restraint of trade and commerce, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

11 COUNT TWO.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That continuously and at all times during the last ten years, and therefore continuously and at all times during the last three years next preceding the finding and presentation of this indictment, in division number one of the District of Alaska, and within the jurisdiction of this court, the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska

Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, hereafter to be referred to as the defendants, did wrongfully, unlawfully, knowingly, and wilfully monopolize trade and commerce, by then and there eliminating from and destroying competition in the business of transporting freight and passengers between the various ports in the United States and British Columbia, in the South, and the various cities, communities, and settlements in the valleys of the Yukon and of its tributaries both in British and American territory, in the North, by way of Lynn Canal, and intermediate points on line of traffic hereinafter to be described; said Pacific and Arctic Railway and Navigation Company being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of West Virginia, the Pacific Coast Steamship
12 Company being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the State of California, the Alaska Steamship Company being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the State of Nevada, the Canadian Pacific Railroad Company being during all the time mentioned herein a corporation organized and doing business under and by virtue of the laws of the Dominion of Canada, and The North Pacific Wharves and Trading Company being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of Washington; that during all the time herein mentioned the said Pacific Coast Steamship Company and the said Alaska Steamship Company have severally been and were operating a several line of steamships as common carriers of passengers and freight, running in regular route between Seattle, in the State of Washington, and Skagway, in the District of Alaska, and during all said time the said Canadian Pacific Railway Company has been and was operating a line of steamships as common carriers of passengers and freight between Vancouver, in British Columbia, and Skagway, in Alaska, the said three last-named transportation companies to be hereafter referred to as the steamship companies; that during all the time herein mentioned the Pacific and Arctic Railway and Navigation Company owned and operated a railroad from tidewater at Skagway, in the District of Alaska, to the summit of White Pass, a distance of, approximately, twenty miles, to the boundary line between Alaska and British Columbia, and at which latter point it connected with a railroad
13 owned and operated by British Columbia Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Province of British Columbia, which latter railroad extended from the said point at the summit of White Pass to the east shore of Lake Bennett and the boundary line between

British Columbia and the Yukon District of Canada, a distance of, approximately, twenty miles, and at which latter point said railroad connected with another railroad owned and operated by British Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and which latter railroad extended from said point at the east shore of Lake Bennett to White Horse, on the headwaters of the Yukon River, in Yukon District of Canada, and that during all the time herein mentioned there has been and was a line of steamships plying upon the Yukon River and its tributaries between White Horse and Dawson, owned and operated by British Yukon Navigation Company, a corporation; that said four corporations last above mentioned and the stocks and bonds of the same were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers were under one and the same management and operated as one continuous line of common carriers of freight and passengers in interstate commerce between said towns of Skagway and Dawson and way points, under the name and style of White Pass and Yukon Route, hereafter to be referred to as the railroad, and as such were used and operated to transport and convey merchandise, commodities, live stock, general freight, and passengers for hire between said points, and that during all the time herein mentioned the said railroad had the sole and exclusive monop-
14 oly on the said transportation business between Lynn Canal and the navigable waters of the Yukon River and tributaries thereof; that during all the time herein mentioned a general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley both in America and British territory, and large quantities of merchandise, commodities, and general freight, as well as large numbers of passengers, were during all such times transported from various ports of the United States, chiefly from the port of Seattle, in the State of Washington, and from various ports in British Columbia, chiefly the ports of Victoria and Vancouver, hereafter to be referred to as the southern ports, to White Horse, Dawson, Eagle, Circle, Rampart, Fairbanks, and other cities, communities, and settlements on the Yukon River and on its tributaries both in British and American territory, and the most natural and the shortest route for such trade, transportation, traffic, and commerce during all the time herein mentioned was, has been, and is, by water craft from said southern ports, to Skagway, at the head of Lynn Canal, Alaska, thence over the Moore Wharf, so called, hereafter described, and thence over said railroad to the navigable waters of the Yukon, and thence down the Yukon by water craft to points of destination, while south-going trade, commerce, and transportation from the said various cities, communities, and settlements on the Yukon River and on its tributaries would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headquarters of that river and thence by way of said railroad to Skagway, Alaska, thence over the said

Moores Wharf, and thence by steamships or other water craft to the said sourthern ports; that during all the time herein men-
15 tioned The North Pacific Wharves and Trading Company was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at which steamships or other water craft could dock and discharge or load cargo, said corporation having during all such time complete and absolute monopoly on the wharfinger business at Skagway, and owned and operated at that port a wharf known and designated as Moores Wharf, which said wharf had, by agreement between said railroad and said The North Pacific Wharves and Trading Company been made, and during all the time herein, pursuant to such agreement, was the southern terminus of said railroad and over which wharf all freight going to or coming from or passing through Skagway had necessarily to pass, which said wharf was, during all the time herein mentioned, by the said The North Pacific Wharves and Trading Company operated as a public wharf.

And the grand jurors, upon their oaths aforesaid, do say: That continuously and at all times during the three years immediately preceding the finding and presentation of this indictment the said defendants aforenamed combined and conspired together to eliminate from and destroy competition in the said transportation business between said southern ports and Skagway, Alaska, for the purpose and with the intent of giving to and creating for the Alaska Steamship Company, Pacific Coast Steamship Company, and Canadian Pacific Railroad Company a monopoly of the said transportation business between the said southern ports and Skagway, Alaska, and to that end, for that purpose, and with that intent, a joint through traffic arrangement was entered into and during said period maintained by and between the said railroad and the said steamship companies, by and through the aforementioned individual de-
16 fendants, the latter acting as officers and agents of said defendant corporations, pursuant to which arrangement either of said steamship companies might, could, and did bill freight and passengers through from either of said southern ports to any point on the said railway or on the said Yukon River along the aforementioned route of travel and transportation, while the said railroad would, could, and did bill freight and passengers through from said Yukon or other northern points on said route of travel to said southern ports only on ships from Skagway south belonging to either of said steamship companies, and, with the intent and purpose aforesaid, rates of transportation of freight and passengers between said southern ports and the various points along said railway or on the Yukon River and tributaries thereof were fixed by defendants herein for such joint through traffic and through billing of freight and passengers as aforesaid, and an apportionment between the said connecting carriers of the gross receipts for such through shipments was by defendants established and agreed upon, and it being further agreed and arranged by and between the defendants for the same

unlawful purpose and with the same unlawful intent, that the said railroad should, and accordingly during all the time herein mentioned did, refuse to enter into any such joint through traffic arrangement with any other carrier or carriers, save the said steamship companies, and refuse to receive any through billing on shipments from said southern ports, except such as arrived at Skagway by ships belonging to one or the other of said steamship companies, and refuse to bill freight or passengers through from said Yukon points to said southern ports, save by ships belonging to either of said steamship companies from Skagway south, and, for the
17 same unlawful purpose and with the same unlawful intent, and as a part of the same combination and conspiracy, it was arranged and agreed by and between the defendants herein that said The North Pacific Wharves and Trading Company should, and it accordingly during all the time herein mentioned did, charge wharfage at the rate of two dollars ($2.00) per ton for all freight handled over its said wharf, the Moores Wharf, except when such freight was shipped on some vessel belonging to either of said steamship companies and was consigned to some one who had entered into or was about to enter into a contrac[illegible]ith either of said steamship companies to bind himself to have all his shipments of freight carried by such steamship company and by no one else, and in which latter case the wharfage of only one dollar ($1.00) per ton was charged, the said wharfage of two dollars ($2.00) per ton and any and all wharfage in excess of one dollar ($1.00) per ton being at all the times herein mentioned unreasonably high, and was charged and exacted for the unlawful purpose aforesaid; and for the purpose and with the intent aforesaid, and as a part of the same combination and conspiracy, it was arranged and agreed by and between the said defendants, during all the time herein mentioned, that the said railroad should, and it accordingly at all times herein mentioned did, fix and establish transportation charges for freight and passengers on said railroad between Skagway and Yukon points at much higher rates than the aforementioned rates established by defendants for said through shipments between said southern ports and the said
18 Yukon points, such local rates, so-called, being from five per cent. to twenty-five per cent. higher than the said joint through rates, differing according to classification of the various commodities shipped; and, pursuant to such arrangement, and for the purpose and with the intent aforesaid the said railroad received from said through shipments as its share of the freight charges from fifteen to thirty-five per cent. less than it charged as aforesaid for the same class of freight shipped between Skagway and the said Yukon points, to the injury of the public.

And the grand jurors, upon their oaths aforesaid, do say: That by means and in the manner aforesaid the defendants herein did monopolize the said trade, traffic, transportation, and commerce between the said southern ports and Skagway, Alaska.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say: That the said defendants, Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, are guilty of the crime of monopolizing trade and commerce contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

19 COUNT THREE.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that continuously and at all times during the period from the 1st day of January, A. D. 1909, to the 16th day of August, A. D. 1910, in division number one, District of Alaska, and within the jurisdiction of this court, the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, hereafter to be referred to as the defendants, did wrongfully, unlawfully, knowingly, wilfully, and maliciously practice unjust discrimination in the transportation of passengers and freight, in violation of the laws of the United States concerning interstate commerce, in manner and form hereinafter set out, to-wit:

That during all the time herein mentioned the Pacific and Arctic Railway and Navigation Company, being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of West Virginia, owned and operated a railroad from tidewater at Skagway, in the District of Alaska, to the summit of White Pass, a distance of, approximately, twenty miles, to the boundary line between Alaska and Britsh Columbia, and at which latter point it connected with the railroad owned and operated by British Columbia Yukon Railway Company,
20 a corporation organized and existing under and by virtue of the laws of the Province of British Columbia, which latter railroad extended from the said point at the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and the Yukon District of Canada, a distance of, approximately, twenty miles, and at which latter point said railroad connected with another railroad owned and operated by British Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and which latter railroad extended from said point at the east side

of Lake Bennett to White Horse, on the Yukon River, in Yukon District of Canada, and that during all the time herein mentioned there has been and was a line of steamships plying upon the Yukon River between White Horse and Dawson, owned and operated by British Yukon Navigation Company, a corporation; that said four corporations last above mentioned and the stocks and bonds of the same were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers were under one and the same management and operated as one continuous line of common carriers of freight and passengers in interstate commerce between the towns of Skagway and Dawson and way points, under the name and style of White Pass and Yukon route, hereafter to be referred to as the railroad, and as such were used and operated to transport and convey merchandise, commodities, live stock, general freight, and passengers for hire between said points, and that during all the time herein mentioned the said railroad had and exercised sole and exclusive monopoly of the said transportation business between Lynn Canal and the navigable waters of the Yukon River; that during all the time herein mentioned a general
21 trade and commerce was carried on between British Columbia and Puget Sound Ports and the Yukon Valley both in American and British territory, and large quantities of merchandise, commodities, and general freight, as well as large numbers of passengers, were during all such times transported from various ports of the United States, chiefly from the port of Seattle, in the State of Washington, and from various ports in British Columbia, chiefly the ports of Victoria and Vancouver, hereafter to be referred to as the southern ports, to White Horse, Dawson, Eagle, Circle, Rampart, Fairbanks, and other cities, communities, and settlements on the Yukon River and on its tributaries both in British and American territory, and the most natural and the shortest route for such trade, transportation, traffic, and commerce during all the time herein mentioned was, has been, and is by water craft from said southern ports to Skagway, at the head of Lynn Canal, Alaska, thence over the Moore Wharf, so-called, hereafter described, and thence over said railroad to the navigable waters of the Yukon, thence down the Yukon by water craft to points of destination, while south-going trade, commerce, and transportation from the said various cities, communities, and settlements on the Yukon River and on its tributaries would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river and thence by way of said railroad to Skagway, Alaska, thence over the said Moores Wharf, and thence by steamships or other water craft to the said southern ports; that during all the time herein mentioned The North Pacific Wharves and Trading Company, being during all the time herein mentioned a corporation
22 organized and doing business under and by virtue of the laws of the State of Washington, was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at

which steamships or other water craft could dock and discharge or load cargo, said corporation having during all such time complete and absolute monopoly on the wharfinger business at Skagway, and owned and operated at that port a wharf known and designated as Moores Wharf, which said wharf had, by agreement between said railroad and said The North Pacific Wharves and Trading Company been made, and, during all the time herein mentioned, pursuant to such agreement, was the southern terminus of said railroad and over which wharf all freight going to or coming from Skagway had necessarily to pass, which said wharf was, during all the time herein mentioned, by the said The North Pacific Wharves and Trading Company operated as a public wharf, and which wharf during all the time herein mentioned constituted a part and portion of the facilities and instrumentalities used by the said railroad in transacting said transportation business;

That the said Pacific Coast Steamship Company was, during all the time herein mentioned, duly organized and existing as a corporation under and by virtue of the laws of the State of California, the Alaska Steamship Company being, during all the time mentioned herein, a corporation organized and doing business under and by virtue of the laws of the State of Nevada, the Canadian Pacific Railroad Company being, during all the time mentioned herein, a corporation organized and doing business under and by virtue of
23 the laws of the Dominion of Canada, the three last-named transportation companies to be hereafter referred to as defendant steamship companies; that the Humboldt Steamship Company, during all the time herein mentioned, was duly organized and existing as a corporation under and by virtue of the laws of the State of California; that said Humboldt Steamship Company and said defendant steamship companies during all the time herein mentioned were engaged as common carriers in operating a line of steamers each from the said southern ports to Skagway, Alaska, transporting passengers and freight on said route above described;

And the grand jurors upon their oaths aforesaid, do say: That said railroad company in its said transportation business aforesaid knowingly, wilfully, and without cause or excuse, continuously and at all times from the said 1st day of January, A. D. 1909, to the said 16th day of August, A. D. 1910, discriminated against the said Humboldt Steamship Company and in favor of the said defendant steamship companies, and knowingly, wilfully, maliciously, and without cause or excuse, gave advantage to the latter in the said transportation, in manner and form as follows, to-wit:

That said railroad company continuously and at all times from the said 1st day of January, A. D. 1909, to the said 16th day of August, A. D. 1910, had entered into and was maintaining with said defendant steamship companies a joint through traffic arrangement whereby and under the terms of which freight and passengers might be and were billed through at a joint through rate from said southern ports over said route of travel to the various points on said route and

on the Yukon River in British and American territory; that continuously and during all the time herein mentioned the Humboldt Steamship Company was operating a steamship known and called the "Humboldt," as a common carrier of passengers and freight on a regular schedule and route between Seattle, in the State of Washington, and Skagway, in Alaska; and that continuously and during all the time herein mentioned, said railroad refused, without cause or excuse, to enter into any such joint through traffic arrangement with the said Humboldt Steamship Company, though duly requested so to do, or to receive, carry, or handle any freight billed through by the said Humboldt Steamship Company from Seattle to any point on the said railway or the Yukon River over said route, though duly requested so to do, and neither would nor did at any time during said period carry from Skagway to any point on said railway or the Yukon River in British or American territory, and freight whatsoever at a less rate of charges than from five per cent to thirty per cent more, according to the classification and character of the freight, than the said railroad received from said defendant steamship companies as its portion of the said joint through rates from said southern ports to the corresponding points on the said railway or on the Yukon for the same class and character of freight, and under substantially the same conditions; and, at the same time, unjustly and without cause or excuse, caused the said The North Pacific Wharves and Trading Company, the aforementioned owner and operator of said Moores Wharf, so-called, at Skagway, said Moores Wharf being then and there the southern terminus of and operated as a part of the terminal instrumentalities for and in the handling of the traffic of said railroad as aforesaid, to charge for all freight shipped on said steamship "Humboldt" for transshipment on said railroad to points along the line of said railway or the Yukon River, a wharfage of two dollars ($2.00) per ton, whereas at the same time the said railroad included in its portion of the said joint through rate all wharfage charges on freight received by it on through billing by one or the other of the said defendant steamship companies; the said railroad company in all the matters and acts above referred to acting by and through its officers and agents, the said A. L. Berdoe, W. B. King, F. B. Wurzbacher, J. H. Young, and S. H. Graves, and others to the grand jury unknown; the said The North Pacific Wharves and Trading Company in all the matters and acts above stated acting by and through its officers and agents: C. E. Wynn Johnson, E. E. Billinghurst, Ira Bronson, W. H. Nansen, and E. J. Shaw, and others to the grand jury unknown; the said Alaska Steamship Company in all the matters and acts above set out acting by and through its officers and agents: Charles E. Peabody, J. H. Bunch, and others to the grand jury unknown; the said Pacific Coast Steamship Company in all matters and acts above stated acting by and through its officers and agents: J. C. Ford, G. H. Higbee, E. C. Ward, and others to the grand jury unknown; each and all of the said defendants knowingly,

wilfully, and maliciously inducing and inciting the said railroad company to practice the discrimination above described, and each and all aiding and abetting one another and the said railroad company in practicing the said discrimination as aforesaid.

And so the grand jurors aforesaid, on their oaths aforesaid, do say: That the said defendants, Pacific and Arctic Railway
26 and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, are guilty of the crime of giving, granting, offering, and practicing discrimination in the transportation of freight and passengers by a common carrier in interstate commerce, and in Territory of Alaska, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

27 COUNT FOUR.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that continuously and at all times during the period from the 18th day of August, A. D. 1910, to the 1st day of January, A. D. 1912, in division number one, District of Alaska, and within the jurisdiction of this court, the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, hereafter to be referred to as the defendants, did wrongfully, unlawfully, knowingly, wilfully, and maliciously practice unjust discrimination in the transportation of passengers and freight, in violation of the laws of the United States concerning interstate commerce, in manner and form hereinafter set out, to wit:

That during all the time herein mentioned the Pacific and Arctic Railway and Navigation Company, being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of West Virginia, owned and operated a railroad from tidewater at Skagway, in the District of Alaska, to the summit of White Pass, a distance of, approximately, twenty miles,
to the boundary line between Alaska and British Columbia,
28 and at which latter point it connected with the railroad owned and operated by British Columbia Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Province of British Columbia, which latter railroad extended from the said point at the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia

and the Yukon District of Canada, a distance of, approximately, twenty miles, and at which latter point said railroad connected with another railroad owned and operated by British Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and which latter railroad extended from said point at the east side of Lake Bennett to White Horse, on the headwaters of the Yukon River, in Yukon District of Canada, and that during all the time herein mentioned there has been and was a line of steamships plying upon the Yukon River between White Horse and Dawson, owned and operated by British Yukon Navigation Company, a corporation; that said four corporations last above mentioned and the stocks and bonds of the same were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers last mentioned were under one and the same management and operated as one continuous line of common carriers of freight and passengers in interstate commerce between the towns of Skagway and Dawson and way points, under the name and style of White Pass and Yukon Route, hereafter to be referred to as the railroad, and as such were used and operated to transport and convey merchandise, commodities, live stock, general freight, and passengers for hire between said points, and that during all the time herein mentioned the said railroad had and exer-
29 cised sole and exclusive monopoly on the said transportation business between Lynn Canal and the navigable waters of the Yukon River; that during all the time herein mentioned a general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley both in American and British territory, and large quantities of merchandise, commodities, and general freight, as well as large numbers of passengers, were during all such times transported from various ports of the United States, chiefly from the port of Seattle, in the State of Washington, and from various ports in British Columbia, chiefly the ports of Victoria and Vancouver, hereafter to be referred to as the southern ports, to White Horse, Dawson, Eagle, Circle, Rampart, Fairbanks, and other cities, communities and settlements on the Yukon River and on its tributaries both in British and American territory, and the most natural and the shortest route for such trade, transportation, traffic, and commerce during all the time herein mentioned was, has been, and is by water craft from said southern ports to Skagway, at the head of Lynn Canal, Alaska, thence over the Moore Wharf, so called, hereafter described, and thence over said railroad to the navigable waters of the Yukon, thence down the Yukon by water craft to points of destination, while south-going trade, commerce, and transportation from the said various cities, communities, and settlements on the Yukon River and on its tributaries would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river and thence by way of
30 said railroad to Skagway, Alaska, thence over the said Moore's Wharf, and thence by steamships or other water craft to the said

southern ports; that during all the time herein mentioned The North Pacific Wharves and Trading Company, being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of Washington, was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at which steamships or other water craft could dock and discharge or load cargo, said corporation having during all such time complete and absolute monopoly on the wharfinger business at Skagway, and owned and operated at that port a wharf known and designated as Moore's Wharf, which said wharf had, by agreement between said railroad and said The North Pacific Wharves and Trading Company been made, and during all the time herein mentioned, pursuant to such agreement, was the southern terminus of said railroad and over which wharf all freight going to or coming from or passing through Skagway had necessarily to pass, which said wharf was, during all the time herein mentioned, by the said The North Pacific Wharves and Trading Company operated as a public wharf, and which wharf during all the time herein mentioned constituted a part and portion of the facilities and instrumentalities used by the said railroad in transacting said transportation business;

That the said Pacific Coast Steamship Company was, during all the time herein mentioned, duly organized and existing as a corporation under and by virtue of the laws of the State of California, the Alaska Steamship Company being, during all the time men-
31 tioned herein, a corporation organized and doing business under and by virtue of the laws of the State of Nevada, the Canadian Pacific Railroad Company being, during all the time mentioned herein, a corporation organized and doing business under and by virtue of the laws of the Dominion of Canada, the said three last-named transportation companies to be hereafter referred to as defendant steamship companies; that the Humboldt Steamship Company, during all the time herein mentioned, was duly organized and existing as a corporation under and by virtue of the laws of the State of California; that said Humboldt Steamship Company and said defendant steamship companies, during all the time herein mentioned were engaged as common carriers in operating a line of steamers each, from the said southern ports to Skagway, Alaska, transporting passengers and freight on said route above described;

And the grand jurors, upon their oaths aforesaid, do say: That said railroad company in its said transportation business aforesaid knowingly, wilfully, unjustly, and without cause or excuse, continuously and at all times from the said 18th day of August, A. D. 1910, to the said 1st day of January, A. D. 1912, discriminated against the said Humboldt Steamship Company and in favor of the said defendant steamship companies, and knowingly, wilfully, unjustly, maliciously, and without cause or excuse, gave advantage to the latter in the said transportation, in manner and form as follows, to wit:

That said railroad company continuously and at all times, from the said 18th day of August, A. D. 1910, to the said 1st day of January, A. D. 1912, had entered into and was maintaining
32 with said defendant steamship companies a joint through traffic arrangement whereby and under the terms of which freight and passengers might be and were billed through at a joint through rate from said southern ports over said route of travel to the various points on said route and on the Yukon River in British and American territory; that continuously and during all the time herein mentioned the Humboldt Steamship Company was operating a steamship, known and called the "Humboldt," as a common carrier of passengers and freight on a regular schedule and route between Seattle, in the State of Washington, and Skagway, in Alaska; and that continuously and during all the time herein mentioned said railroad refused, unjustly and without cause or excuse, to enter into any such joint through traffic arrangement with the said Humboldt Steamship Company, though duly requested so to do, or to receive, carry, or handle any freight billed through by the said Humboldt Steamship Company from Seattle to any point on the said railway or the Yukon River over said route, though duly requested so to do, and neither would nor did at any time during said period carry from Skagway to any point on said railway or the Yukon River in British or American territory, any freight whatsoever at a less rate of charges than from five per cent to thirty per cent more, according to the classification and character of the freight, and under substantially the same conditions, than the said railroad received from said defendant steamship companies as its portion of the said joint through rates from said southern ports to the corresponding points on the said railway or on the Yukon for the same class and
33 character of freight, and, at the same time unjustly and maliciously caused the said The North Pacific Wharves and Trading Company, the aforementioned owner and operator of said Moores Wharf, so-called, at Skagway, said Moores Wharf being then and there the southern terminus of and operated as a part of the terminal instrumentalities for and in the handling of the traffic of said railroad as aforesaid, to charge for all freight shipped on the said steamship "Humboldt" for transshipment on said railroad to points along the line of said railway or the Yukon River, a wharfage of two dollars ($2.00) per ton, whereas, at the same time the said railroad included in its portion of the said joint through rate all wharfage charges on freight received by it on through billing by one or the other of the said defendant steamship companies; the said railroad company in all the matters and acts above referred to acting by and through its officers and agents; the said A. L. Berdoe, W. B. King, F. B. Wurzbacher, J. H. Young, and S. H. Graves, and others, to the grand jury unknown; the said The North Pacific Wharves and Trading Company in all the matters and acts above stated, acting by and through its officers and agents, the said C. E. Wynn Johnson, E. E. Billinghurst, Ira Bronson, W. H. Nan-

sen, and E. J. Shaw, and others to the grand jury unknown; the said Alaska Steamship Company, in all the matters and acts above set out, acting by and through its officers and agents, the said
34 Charles L. Peabody, J. H. Bunch, and others to the grand jury unknown; the said Pacific Coast Steamship Company, in all matters and acts above stated, acting by and through its officers and agents, the said J. C. Ford, G. H. Higbee, E. C. Ward, and others to the grand jury unknown; each and all of the said defendants knowingly, wilfully, and maliciously inducing and inciting the said railroad company to practice the discrimination above described, and each and all aiding and abetting one another and the said railroad company in practicing the said discrimination as aforesaid.

And so the grand jurors aforesaid, on their oaths aforesaid, do say: That the said defendants, Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher are guilty of the crime of giving, granting, offering, and practicing unjust discrimination in the transportation of freight and passengers by a common carrier in interstate commerce, and in Territory of Alaska, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

35 COUNT FIVE.

And the grand jurors aforesaid, on their oaths aforesaid, do further present: That continuously and at all times during the period from the 18th day of August, A. D. 1910, up to the time of the finding and presentation of this indictment, in division number one, District of Alaska, and within the jurisdiction of this court, the Pacific and Arctic Railway and Navigation Company, the Pacific Coast Steamship Company, the Alaska Steamship Company, the Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, hereafter to be referred to as the defendants, did wrongfully, unlawfully, knowingly, wilfully, and maliciously fail and refuse to establish through routes of transportation of passengers and freight in interstate commerce, in violation of the laws of the United States concerning interstate commerce, in manner and form hereinafter set out, to-wit:

That during all the time herein mentioned the Pacific and Arctic Railway and Navigation Company, being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of West Virginia, owned and operated

a railroad from tidewater at Skagway, in the District of Alaska, to the summit of White Pass, a distance of, approximately, twenty miles, to the boundary line between Alaska and British Columbia, and at which latter point it connected with the railroad owned and
36 operated by British Columbia Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Province of British Columbia, which latter railroad extended from the said point at the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and the Yukon district of Canada, a distance of, approximately, twenty miles, and at which latter point said railroad connected with another railroad owned and operated by British Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and which latter railroad extended from said point at the east side of Lake Bennett to White Horse, on the headwaters of the Yukon River, in Yukon District of Canada, and that during all the time herein mentioned there has been and was a line of steamships plying upon the Yukon River between White Horse and Dawson, owned and operated by British Yukon Navigation Company, a corporation; that said four corporations last above mentioned and the stocks and bonds of the same were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers were under one and the same management and operated as one continuous line of common carriers of freight and passengers in interstate commerce between the town of Skagway and Dawson and way points, under the name and style of White Pass and Yukon Route, hereafter to be referred to as the railroad, and as such were used and operated to transport and convey merchandise, commodities, live stock, general freight, and passengers for hire between said points, and that
37 during all the time herein mentioned the said railroad had and exercised sole and exclusive monopoly on the said transportation business between Lynn Canal and the navigable waters of the Yukon River; that during all the time herein mentioned a general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, and large quantities of merchandise, commodities, and general freight, as well as large numbers of passengers, were during all such times transported from various ports of the United States, chiefly from the port of Seattle, in the State of Washington, and from various ports in British Columbia, chiefly the ports of Victoria and Vancouver, hereafter to be referred to as the southern ports, to White Horse, Dawson, Eagle, Circle, Rampart, Fairbanks, and other cities, communities, and settlements on the Yukon River and on its tributaries both in British and American territory, and the most natural and the shortest route for such trade, transportation, traffic, and commerce during all the time herein mentioned was, has been, and is by water craft from said southern ports to Skagway, at the head of Lynn Canal, Alaska, thence over the Moore Wharf, so

called, hereafter described, thence over said railroad to the navigable waters of the Yukon, thence down the Yukon by water craft to points of destination, while south-going trade, commerce, and transportation from the said various cities, communities, and settlements on the Yukon River and on its tributaries would naturally, when left
38 untrammelled by unlawful interference, move up the Yukon to the headwaters of that river, thence by way of said railroad to Skagway, Alaska, thence over the said Moores Wharf, and thence by steamships or other water craft to the said southern ports; that during all the time herein mentioned The North Pacific Wharves and Trading Company, being during all the time herein mentioned a corporation organized and doing business under and by virtue of the laws of the State of Washington, was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at which steamships or other water craft could dock and discharge or load cargo, said corporation having during all such time complete and absolute monopoly on the wharfinger business at Skagway, and owned and operated at that port a wharf known and designated as Moores Wharf, which said wharf had, by agreement between said railroad and said The North Pacific Wharves and Trading Company been made, and during all the time herein mentioned, pursuant to such agreement, was the southern terminus of said railroad and over which wharf all freight going to or coming from or passing through Skagway had necessarily to pass, which said wharf was, during all the time herein mentioned, by the said The North Pacific Wharves and Trading Company operated as a public wharf, and which wharf during all the time herein mentioned constituted a part and portion of the facilities and instrumentalities used by the said railroad in transacting said transportation business;

39 That the Humboldt Steamship Company, during all the time herein mentioned, was a corporation duly organized and existing under and by virtue of the laws of the State of California and, continuously and during all the time herein mentioned and up to the time of the finding and presentation of this indictment, was operating, in interstate commerce, a steamship known and called the "Humboldt" operated and run on a regular route and schedule between Seattle and Skagway, Alaska, as a common carrier of passengers and freight, in the said trade and commerce above described, and during all such period freight and passengers were transported by the said steamship "Humboldt" from Seattle to Skagway, destined for the various cities, communities, and settlements on the said Yukon River and tributaries thereof and along the route of the said railway, and continuously during said period was transporting passengers from Skagway to Seattle on their way south from the said cities, communities, and settlements on the said Yukon River and tributaries thereof and along the said railway aforesaid; that the said defendant railroad company continuously at all times and ever since the said 18th day of August, A. D. 1910, and up to

the finding and presentation of this indictment, unreasonably, unjustly, and without cause or excuse, has refused to establish a through route for such transportation between said southern ports and said northern points along the said railway and the said Yukon River by way of said steamship "Humboldt" and said railroad as connecting carriers, and has during said period, without cause or excuse, continuously refused to enter into or establish any through traffic arrangement with the said Humboldt Steamship Com-
40 pany whereby and whereunder freight could be shipped through on through bills of lading from said southern ports to said northern points aforementioned by way of the steamship "Humboldt" and the said railroad as connecting carriers, or by which passenger tickets could be sold for a through journey between said southern ports and said northern points by way of said railroad and said steamship "Humboldt" as connecting carriers; that during all the times aforesaid the said railroad company's codefendants above mentioned have maliciously induced, incited, and procured the said railroad company to so fail and refuse to establish such through route and joint traffic arrangements, and aided and abetted the said railroad company in such refusal; the said Pacific Coast Steamship Company being, during all the time herein mentioned, duly organized and existing as a corporation under and by virtue of the laws of the State of California, the Alaska Steamship Company being, during all the time mentioned herein, a corporation organized and doing business under and by virtue of the laws of the State of Nevada, and the Canadian Pacific Railroad Company being, during all the time mentioned herein, a corporation organized and doing business under and by virtue of the laws of the Dominion of Canada.

And so the the grand jurors aforesaid, on their oaths aforesaid, do say: That the defendants, Pacific and Arctic Railway and Navi-
gation Company, Pacific Coast Steamship Company, Alaska
41 Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, are guilty of the crime of failing and refusing to establish through rates for transportation of freight and passengers by common carriers in interstate commerce, and in Territory of Alaska, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

42 COUNT SIX.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That continuously and at all times during the last four years, and therefore continuously and at all times during the

last three years next preceding the finding and presentation of this indictment, in division number one of the District of Alaska, and within the jurisdiction of this court, the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, hereafter to be referred to as the defendants, did wrongfully, unlawfully, and wilfully conspire to commit an offense against the United States, in manner and form as follows, to wit:

That during all the time herein mentioned the Pacific and Arctic Railway and Navigation Company was a corporation organized and doing business under and by virtue of the laws of the State of West Virginia; that the Pacific Coast Steamship Company was, during all the time herein mentioned, a corporation organized and doing business under and by virtue of the laws of the State of California; that the Alaska Steamship Company was, during all the time herein
mentioned, a corporation organized and doing business under
43 and by virtue of the laws of the State of Nevada; that the Canadian Pacific Railroad Company was, during all the time herein mentioned, a corporation organized and doing business under and by virtue of the laws of the Dominion of Canada; and that The North Pacific Wharves and Trading Company was, during all the time mentioned herein, a corporation organized and doing business under and by virtue of the laws of the State of Washington; that during all the time herein mentioned the said Pacific Coast Steamship Company and Alaska Steamship Company were each operating a line of steamships as common carriers of passengers and freight, running on regular route between Seattle, in the State of Washington, and Skagway, in the District of Alaska, and way points, and during all the said time the said Canadian Pacific Railroad Company has been and was operating a line of steamships as common carriers of passengers and freight between Vancouver, in British Columbia, and Skagway, in Alaska, and way points; said three last-named transportation companies to be hereafter referred to as defendant steamship companies; that during all the time herein mentioned the Humboldt Steamship Company was a corporation duly organized and existing under and by virtue of the laws of the State of California, and was operating a steamboat on a regular route and schedule between Seattle, in the State of Washington, and Skagway, in Alaska, and way points, carrying freight and passengers as a common carrier; that during all the time herein mentioned the Pacific and Arctic Railway and Navigation Company owned and operated a railroad
from tidewater at Skagway, in the District of Alaska, to the
44 summit of White Pass, a distance of, approximately, twenty miles, to the boundary line between Alaska and British

Columbia, and at which latter point it connected with a railroad owned and operated by British Columbia Yukon Railway Company, a corporation organized and existing under the laws of the Province of British Columbia, which latter railroad extended from the said point at the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and the Yukon district of Canada, a distance of, approximately, twenty miles, and at which latter point said railroad connected with another railroad owned and operated by British Yukon Railway Company, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and which latter railroad extended from said point at the east shore of Lake Bennett to White Horse, on the Yukon River, in Yukon district of Canada, and that during all the time herein mentioned there has been and was a line of steamships plying upon the Yukon River between White Horse and Dawson, owned and operated by British Yukon Navigation Company, a corporation; that said four corporations last above mentioned and the stocks and bonds of the same were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers were under one and the same management and operated as one continuous line of common carriers of freight and passengers in interstate commerce between said town of
45 Skagway and way points, under the name and style of White Pass and Yukon Route, hereafter to be referred to as the railroad, and as such were used and operated to transport and convey merchandise, commodities, live stock, general freight and passengers for hire between said points, and that during all the time herein mentioned the said railroad had the sole and exclusive monopoly on the said transportation business between Lynn Canal and the navigable waters of the Yukon River; that during all the time herein mentioned a general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, and large quantities of merchandise, commodities, and general freight, as well as large numbers of passengers, were during all such times transported from various ports of the United States, chiefly from the port of Seattle, in the State of Washington, and from various ports in British Columbia, chiefly the ports of Victoria and Vancouver, hereafter to be referred to as the southern ports, to White Horse, Dawson, Eagle, Circle, Rampart, Fairbanks, and other cities, communities, and settlements on the Yukon River and on its tributaries, both in British and American territory, and the most natural and the shortest route for such trade, transportation, traffic, and commerce during all the time herein mentioned was, has been, and is, by water craft from said southern ports to Skagway, at the head of Lynn Canal,
46 Alaska, thence over the Moore Wharf, so called, hereafter described, and thence over said railroad to the navigable waters of the Yukon, and thence down the Yukon by water craft to points

of destination, while south-going trade, commerce, and transportation from the said various cities, communities, and settlements on the Yukon River and on its tributaries would naturally, when left untrammelled by unlawful interference, move up the Yukon to the headwaters of that river and thence by way of said railroad to Skagway, Alaska, thence over the said Moores Wharf, thence by steamships or other water craft to the said southern ports; that during all the time herein mentioned The North Pacific Wharves and Trading Company was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at which steamships or other water craft could dock and discharge or load cargo, said corporation having during all such time complete and absolute monopoly on the wharfinger business at Skagway, and owned and operated at that port a wharf known and designated as Moores Wharf, which said wharf had, by agreement between said railroad and said The North Pacific Wharves and Trading Company, been made, and during all the time mentioned herein, pursuant to such agreement, was, the southern terminus of said railroad, and over which wharf all freight going to or coming from Skagway had necessarily to pass, which said wharf was, during all the time herein mentioned, by the said The North Pacific Wharves and Trading Company, operated as a public wharf.

47 And the grand jurors, upon their oaths aforesaid, do further say: That during all the time herein mentioned there was a natural competition between the said defendant steamship companies and the said Humboldt Steamship Company in the transportation of passengers and freight from the said southern ports to Skagway and way points, and that during all the time herein mentioned the defendants above named conspired and agreed, and by such conspiracy and agreement endeavored, to eliminate and destroy all competition in the said transportation business between said Humboldt Steamship Company and the said defendant steamship companies by having the said Humboldt Steamship Company agree with and enter into a traffic arrangement with the said defendant steamship companies wherein and whereby the charges, prices, and rates for transportation of freight and passengers on said route between Skagway and Seattle and way points were fixed and established and to be adhered to by all said parties, and to fix and establish such rates and charges at a point higher than would naturally be charged in case competition between the said parties aforementioned should be continued, and that for the purpose of forcing and compelling the said Humboldt Steamship Company to enter into such a combine, agreement, and traffic arrangement with the said defendant steamship companies to maintain fixed rates of transportation and to maintain the same above normal rates under competition, said defendants conspired and agreed to

48 have the said Pacific and Arctic Railway and Navigation Company refuse to enter into any joint through traffic arrangement with the said Humboldt Steamship Company for through

traffic of passengers and freight between the said southern ports and the said cities, communities, and settlements on the Yukon River, and to refuse to recognize the said Humboldt Steamship Company as a connecting carrier with the said railroad; to have the said The North Pacific Wharves and Trading Company charge, as wharfage for freight handled over its said wharf at Skagway, twice as much as was charged for freight transported by either of the said defendant steamship companies, and twice as much as was just and reasonable, and to have the said railroad practice other unjust discriminations against said Humboldt Steamship Company and in favor of said defendant steamship companies, and, if those methods and plots were not sufficient to compel the said Humboldt Steamship Company to enter the combine in the restraint of trade and commerce aforesaid, then to have the said defendant steamship companies reduce rates on passengers and freight on said route between said southern ports and Skagway, Alaska, and way points, to a point where they became unremunerative, and by this additional means compel the Humboldt Steamship Company to enter the said combine and agree to abide by such rates for passenger and freight transportation as such combine should fix, in order to eliminate competition in said transportation business aforesaid; and that, pursuant to said conspiracy, the said defendants, aiding and abetting one another, each cooperating
49 to the same end, for the same purpose, and with the intent to effect the object of said conspiracy as aforesaid, the said railroad during all the time herein mentioned did wrongfully and unjustly refuse to enter into any joint through traffic arrangement with the said Humboldt Steamship Company or to recognize the same as a connecting carrier, although the said railroad company did enter into and maintain such joint through traffic arrangement with the said defendant steamship companies, and the said The North Pacific Wharves and Trading Company did continuously during said period wrongfully and unjustly charge the sum of two dollars ($2.00) per ton wharfage for all freight handled over its said wharf at Skagway shipped by said Humboldt Steamship Company, although and notwithstanding the fact that the said The North Pacific Wharves and Trading Company during said period charged only one dollar ($1.00) per ton wharfage for any freight handled over its said wharf shipped by carriers belonging to either of the defendant steamship companies, all wharfage over one dollar ($1.00) per ton being at all times unjustly excessive, and local rates for transportation of freight and passengers from Skagway to the said northern points on the said railway were fixed by the said railroad pursuant to said conspiracy and to effect the object of such conspiracy, at a much higher rate than was charged or collected by the said railroad company for passengers or freight shipped through from said southern ports to said northern points by way of said defendant steamship companies; and that from the first day of November, A. D. 1909, until the first day of April, A. D. 1910, the said defendant steamship companies

50 reduced the rates of transportation of passengers and freight between the said southern ports and Skagway and way points sixty per cent (60%) of the rates up to that time charged and collected for similar services by said defendant steamship companies, by reason of which the rates for such transportation were and became unremunerative, such reduction being made as aforesaid for the purpose of effecting the said conspiracy aforesaid, which conspiracy aforesaid was in restraint of trade and commerce, for the purpose of enabling the said defendant steamship companies to and having them monopolize the said transportation business aforesaid.

And so the grand jurors, upon their oaths aforesaid do say: That the defendants, the Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railway Company, The North Pacific Wharves and Trading Company, A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, are guilty of the crime of conspiring to commit an offense against the United States, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

JOHN RUSTGARD,
United States Attorney.

51 [Endorsed:] No. 837–B. In the United States District Court for the District of Alaska, Division No. one. United States of America vs. Pacific and Arctic Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher. Indictment violation of Sherman Anti-Trust Act. A true bill, J. Latimer Gray, foreman; filed this 13th day of February, A. D. 1912. E. W. Pettit, clerk; John Rustgard, U. S. attorney. Witnesses (examined before the grand jury): Max Kalish, J. M. Tanner, Phil Abrahams, E. J. Shaw, W. C. Blanchard, R. W. Reid, Charles B. Marten, P. H. Ganty. Presented by J. Latimer Gray, foreman of the grand jury, in the presence of the grand jury, in open court, and filed in open court with the clerk of the District Court, all on this 13th day of February, 1912. E. W. Pettit, clerk of District Court, Dist. of Alaska, division No. 1.

52 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA *vs.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles H. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher.	No. 837. Motion to quash and set aside indictment.

Comes now the defendant Pacific and Arctic Railway and Navigation Company in person and by its attorneys, Bogle, Graves, Merritt & Bogle and Royal A. Gunnison, and moves this honorable court that an order be entered herein setting aside and quashing the several counts contained in the indictment herein and each thereof upon the following grounds:

COUNT ONE.

That count one be set aside and quashed for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offence or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

53 6. That said count is not direct or certain as it regards the particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offence of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge made.

16. That said count is in other respects informal, insufficient, and defective.

COUNT TWO.

That count two be set aside and quashed for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

54 2. That said count does not charge or allege facts against said defendant sufficient to constitute an offence or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards the particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offence of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant
55 of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge made.

16. That said count is in other respects informal, insufficient, and defective.

COUNT THREE.

That count three be set aside and quashed for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

56 12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offence of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon

which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge made.

16. That said count is in other respects informal, insufficient, and defective.

COUNT FOUR.

That count four be set aside and quashed for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

57 7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offence of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge.

16. That said count is in other respects informal, insufficient, and defective.

COUNT FIVE.

That count five be set aside and quashed for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

58 2. The said count does not charge or allege facts against said defendant sufficient to constitute an offence or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offence of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant

59 of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge.

16. That said count is in other respects informal, insufficient, and defective.

COUNT SIX.

That count six be set aside and quashed for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire

into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jursdiction over the subject matter of said count.

60 12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offence of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge.

16. That said count is in other respect informal, insufficient, and defective.

ENTIRE INDICTMENT.

Said defendant without waiving his aforesaid motion but insisting upon the same moves the court to set aside and quash the indictment for the following reasons:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crimes therein charged or any of them, because the same, or any of them, are not triable within said District of Alaska.

2. That said indictment does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said indictment do not constitute a crime.

4. That said indictment is not direct or certain as it regards the party charged.

5. That said indictment is not direct or certain as it regards the crime charged.

6. That said indictment is not direct or certain as it regards the particular circumstances of the crime charged.

61 7. That said indictment charges more than one crime.

8. That said indictment fails to charge but one crime and in one form only.

9. That said indictment fails to sufficiently show that the crimes charged, or any of them, were committed within the jurisdiction of said court.

10. That said indictment fails to show the crimes charged or any any of them were committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said indictment.

12. Court has no jurisdiction over the person of said defendant.

13. That said indictment does not allege any offense of which this court has jurisdiction.

14. That said indictment is irregular and void upon its face.

15. That said indictment is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and material allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which it will be required to meet upon the trial on the specific charge.

16. That said indictment is in other respects informal, insufficient, and defective.

17. That said indictment is bad for multifariousness and duplicity.

18. That said indictment as a whole is needlessly long, involved, ambiguous, and uncertain, containing many redundant, irrelevant, and immaterial allegations, rendering the same unintelligible and difficult and impossible of contraction, and that the same is

62 lacking in that degree of certainty of averment essential to a good indictment, and wholly fails to clearly inform the defendant of the character and nature of the offense with which it is charged, or the character of the evidence which it will be called upon to meet, so as to enable it to intelligently prepare for trial.

19. That said indictment contains several charges against said defendant, but that said charges are not for the same act or transaction, nor for two or more acts or transactions which are connected together, nor for two or more acts or transactions of the same class of crimes or offenses.

20. That said indictment is fatally defective and insufficient in that it does not allege the acts or omissions charged as the various

crimes in the several counts thereof with such degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

BOGLE, GRAVES, MERRITT & BOGLE,
ROYAL A. GUNNISON,
Attorneys for defendant.

I, W. H. Bogle, an attorney and counsellor at law of the above-entitled court for the District of Alaska, and one of the attorneys for defendant, hereby certify that I have examined the foregoing motion and carefully inquired into the merits thereof and believes the same to be well taken and made in point of law and that it is not interposed for delay.

W. H. BOGLE.

UNITED STATES OF AMERICA, DISTRICT OF ALASKA, DIVISION NO. 1 *ss:*

Service of a copy of the above and foregoing motion to quash is hereby acknowledged this 11th day of March, 1912.

JOHN RUSTGARD,
United States District Attorney.

63 [Endorsed:] No. 837–B. In the United States District Court for the District of Alaska, Division No. 1, United States of America *vs.* Pacific and Arctic Railway and Navigation Company, a corporation, et al., motion of the defendant Pacific and Arctic Railway and Navigation Company, a corporation, to quash and set aside indictment. Bogle, Graves, Merritt & Bogle, Royal A. Gunnison, attorneys for said defendant. Filed Mar. 11, 1912, E. W. Pettit, clerk, by ——— ———, deputy.

217 In the United States District Court for the District of Alaska, division No. one.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants. } No. 837–B.

OPINION.

The indictment in this case contains six counts and alleges substantially:

Count one charges that the defendants did wrongfully, unlawfully, knowingly, and wilfully engage in a combination and conspiracy in

restraint of trade and commerce by then and there combining and conspiring with one another to eliminate from and destroy competition in the business of transporting freight and passengers between various ports in the United States and British Columbia, in the south, and various settlements and communities on the Yukon River and its tributaries, both in British and American territory, in the north, by way of Lynn Canal and intermediate points, for the purpose and with the intent of monopolizing such trade and commerce. The corporate existence of the various corporate defendants is also alleged, and what is described as the White Pass and Yukon
218 route, being the defendant Pacific and Arctic Railway and Navigation Company, and its connecting carriers between Skagway and Dawson, is also alleged in detail.

Count one further alleges that said defendant railroad and its connecting carriers between Skagway and Dawson, which is referred to as the "railroad," had a monopoly on the transportation business between Skagway and Dawson, and further alleges that the natural route of travel from the southern ports to the points on the Yukon River is by water craft from the southern ports to Skagway, thence over Moores Wharf, thence over the railroad to the navigable waters of the Yukon, and down the Yukon to points of destination; that the North Pacific Wharves and Trading Company was the owner and in exclusive possession and control of all the wharves at Skagway, Alaska, at which steamships or other water craft could dock and discharge or load cargo; said corporation at all times having a complete and absolute monopoly on the wharfinger business at Skagway and owned and operated at that port the wharf known and designated as Moores Wharf, which said wharf had, by agreement between said railroad and the said North Pacific Wharves and Trading Company, been made, and during all times mentioned pursuant to such agreement was, the southern terminus of the said railroad and over which wharf all freight going to or coming from or passing through Skagway had necessarily to pass, which said wharf was during all times mentioned by the said North Pacific Wharves and Trading Company operated as a public wharf; that continuously during the three years immediately preceding the finding of the indictment the defendants conspired to eliminate and destroy all competition in the transportation business between the south-
219 ern ports and Skagway, Alaska, for the purpose and with the intent of giving to and creating for the defendant steamship companies a monopoly of the said transportation business between said southern ports and Skagway, and to that end and for that purpose and with that intent a joint through-traffic arrangement was entered into and continuously during said period maintained by and between the said railroad and steamship companies by and through all of the individual defendants, the latter acting as officers and agents of the said defendant corporations. Pursuant to which arrangement either of said defendant steamship companies might, could, and did bill freight and passengers through from any southern port to any

point on the said railroad or the said Yukon River and its tributaries; while the said railroad did and would bill freight and passengers through from said Yukon or other northern points on said route of travel to said southern ports only on ships from Skagway south belonging to either of said defendant steamship companies, and with the intent and purpose aforesaid rates of transportation of freight and passengers between said southern ports and the various points along the railroad and the Yukon River and its tributaries were fixed by the defendants for such joint through traffic and through billing of freight and passengers aforesaid, and an apportionment between the said connecting carriers of the gross receipts for said through shipments was by defendants established and agreed upon. It was further agreed and arranged by and between the defendants for the same unlawful purpose and with the same unlawful intent that the said railroad should, and accordingly during all times mentioned it did, refuse to enter into any such joint through-traffic arrangement with any carrier, or carriers, and refused to receive any other through billing on shipments from said southern ports except
220 such as arrived at Skagway by some ship belonging to one of the defendant steamship companies and refused to bill freight or passengers through from Yukon points to the southern ports except by ships belonging to one of the defendant steamship companies from Skagway south. And for the same unlawful purpose and with the same unlawful intent and as a part of the same combination and conspiracy it was agreed by and between the defendants that the said North Pacific Wharves and Trading Company should, and it did, charge a wharfage at a rate of two dollars per ton for all freight handled over its said wharf except when the same was shipped on one of the vessels of the defendant steamship companies and was consigned to some one who had entered into or was about to enter into a contract with either of the steamship companies to bind himself to ship all of his freight carried by said *said* steamship company and by no one else, and in which latter case a wharfage of one dollar per ton was charged; that two dollars was an excessive charge, and any price greater than one dollar per ton was unreasonably high. And it was further agreed that the railroad company should, and it actually did, fix and establish transportation charges for freight and passengers on the railroad between Skagway and Yukon points at a much higher rate than the aforementioned rates established by defendants for said through shipments, such through rates, so called, being from five to twenty-five per cent higher than the said joint through rates, differing according to the classification under the various commodities shipped; and pursuant to such arrangement and for the purpose and with the intent aforesaid the railroad company received on said through shipments as its share of the freight charges from fifteen to thirty per cent lesss than it charged as aforesaid for the same class of freight shipped between Skagway and the Yukon points; that by reason of which facts
221 it became and was during all times mentioned unprofitable

for the people to employ any carrier in said trade, traffic, and commerce save one of the defendant steamship companies.

Count two charges that the defendants did wrongfully, unlawfully, knowingly, and wilfully monopolize trade and commerce by then and there eliminating from and destroying competition in the business of transporting freight and passengers between the various ports of the United States and British Columbia, in the south, and the various cities, communities, and settlements in the valleys of the Yukon and its tributaries, both in British and American territory, in the north.

The particular facts charged in count two are substantially the same as those contained in count one.

Count three alleges that the defendants did wrongfully, unlawfully, knowingly, wilfully, and maliciously practice unjust discrimination in the transportation of passengers and freight in violation of the laws of the United States concerning interstate commerce; that the defendant, Pacific and Arctic Railway and Navigation Company, is a corporation and connects with other common carriers, making a continuous route, known as the White Pass and Yukon route, between Skagway, Alaska, and Dawson, Yukon territory, and that the said defendant railroad company and its connecting carriers have a monopoly on the transportation business from Skagway to Dawson and way points; that during the time named there was an extensive business in the transportation of passengers and freight from the United States and British Columbia points to Skagway, and from Skagway over the Moores Wharf to the railroad, and from thence over the defendant railroad company's line and connecting lines to various points in the interior; that the North Pacific Wharves and Trading Company is a corporation and owns and is in exclusive possession and control of all the wharves at Skagway at which steamships or other water craft could dock or discharge or load cargo; said corporation having during all such time a complete and absolute monopoly on the wharfinger business at Skagway and owned and operated at that port a wharf known and designated as the Moores Wharf, which said wharf had by agreement between said railroad and the North Pacific Wharves and Trading Company been made, and during all times mentioned, pursuant to such agreement, was, the southern terminus of said road, and over which wharf all freight going to or coming from Skagway had necessarily to pass, which said wharf was during all times mentioned operated as a public wharf and constituted a part and portion of the facilities and instrumentalities in use by the said railroad in transacting said transportation business.

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Count two further alleges the corporate existence of the three defendant steamship companies as well as the corporate existence of the Humboldt Steamship Company; that said Humboldt Steamship Company and said defendant steamship companies, during all times mentioned, were engaged as common carriers in operating a line of steamers from the southern ports, transporting passengers and freight

to Skagway; that the defendant railroad company in its transportation business knowingly, wilfully, and without cause or excuse continuously and at all times from the first day of January, 1909, to the sixteenth day of August, 1910, discriminated against the said Humboldt Steamship Company and in favor of said defendant steamship companies, and knowingly, wilfully, maliciously, and without cause or excuse gave advantage to the latter in the said transportation business; that the said railroad company had entered into and
223 was maintaining with the defendant steamship companies a joint through traffic arrangement whereby and under the terms of which freight and passengers were billed through at a joint through rate from the southern ports over said route of travel to the various points on the Yukon River and the American territory; that continuously during all times mentioned the Humboldt Steamship Company was operating a steamship known and called the Humboldt, a common carrier of passengers and freight, on a regular schedule and route between Seattle, in the State of Washington, and Skagway, in Alaska, and that continuously the railroad refused without cause or excuse to enter into any such joint through traffic arrangement with the Humboldt Steamship Company, though duly requested so to do and to receive, carry, or handle any freight billed through by the Humboldt Steamship Company from Seattle to any point on the railroad or the Yukon River over said route, though duly requested so to do, and did not and would not at any time during the period named carry from Skagway to any point on the railroad or the Yukon River any freight whatsoever at a less rate of charges than from five to thirty per cent more, according to the classification and character of freight, than the said railroad received from the said defendant steamship companies as its portion of the said joint through rates from said southern ports to the corresponding points on the said railroad or on the Yukon for the same class and character of freight, and substantially under the same conditions, and at the same time unjustly and without cause or excuse caused the North Pacific Wharves and Trading Company, the owner of Moores Wharf at Skagway, said wharf being then and there the southern terminus of and operated as a part of the terminal instrumentalities in the handling of the traffic of said railroad, to
224 charge for all freight shipped on the said steamship Humboldt for transshipment on said railroad to points along the line of the railroad or the Yukon River a wharfage of two dollars per ton, whereas at the same time said railroad included in its portion of the said joint through rate all wharfage charges on freight received by it on through billing by one or another of said defendant steamship companies, the said railroad company in all matters and acts referred to acting by and through its officers and agents, the said Berdoe, King, Wurzbacker, Young, and S. H. Graves and others to the grand jury unknown; the said North Pacific Wharves and Trading Company in all matters and acts above stated, acting by and through its officers and agents, Wynn-Johnson, Billinghurst, Bronson, Nansen,

and Shaw; the defendant Alaska Steamship Company, acting by and through its officers and agents, Peabody and Bunch; the Pacific Coast Company, acting by and through its officers and agents, Ford, Higbee, and Ward; each and all of said defendants knowingly, wilfully, and maliciously inducing and inciting said railroad company to practice the discrimination above described and each and all aiding and abetting one another and the said railroad company in practicing the said discrimination aforesaid.

Count four charges that from the eighteenth day of August, 1910, to the first day of January, 1912, the defendants did wrongfully, unlawfully, knowingly, wilfully, and maliciously practice unjust discrimination in the transportation of passengers and freight in violation of the laws of the United States concerning interstate commerce.

Count four states substantially the same facts as count three, except that the alleged discrimination was practiced during a different period.

225 Count five charges that continuously and at all times during the period from the eighteenth day of August, 1910, up to the time of the finding of the indictment, the defendants wrongfully, unlawfully, knowingly, wilfully, and maliciously failed and refused to establish through routes in the transportation of passengers and freight in interstate commerce in violation of the laws of the United States concerning interstate commerce.

Count five merely charges that the railroad company refused without cause or excuse to establish a through routing with the Humboldt Steamship Company between the southern ports and the northern points along said railroad, and has without cause continuously refused to enter into or establish any through traffic arrangements with the Humboldt Steamship Company whereby freight could be shipped through on through bills of lading from the southern ports to the northern points by way of the steamship Humboldt; that during all times mentioned the railroad company's codefendants above mentioned have maliciously induced and incited and procured the said railroad company to fail and to refuse to establish such through route and joint traffic arrangements and aided and abetted the railroad company in such refusal. The count contains no allegation as to what part the individual defendants took in the matter nor is there any allegation that the defendant corporation acted by or through the individual defendants as agents.

Count six alleges that during the three years next preceding the finding of the indictment the defendants did wrongfully, unlawfully, and wilfully conspire to commit an offense against the United States. The count alleges the corporate existence of the defendant corporations and also the business in which they were engaged as in

226 the former counts; also alleges the corporate existence of the Humboldt Steamship Company; that the same was operated on a regular route and schedule between Seattle, in the State of Washington, and Skagway and way points, carrying freight and

passengers as a common carrier, and alleges the corporate existence of the defendant railroad company with its connecting carriers. Further alleges the monopoly by the railroad company of all of the transportation business between Skagway, Dawson, and way points; that the North Pacific Wharves and Trading Company was the owner of all the wharves in Skagway at which steamships could dock and discharge or load cargo, and that said corporation had during all the time a complete and absolute monopoly of the wharfinger business at Skagway and owned and operated at that port a wharf known as the Moores Wharf, which said wharf had, by agreement between the railroad company and the wharf company, been made, and during all times mentioned was, the southern terminus of said railroad and over which wharf all freight going to and coming from Skagway had necessarily to pass; that the said wharf was always operated as a public wharf; that there was a natural competition between the defendant steamship companies and the Humboldt Steamship Company in the transportation of passengers and freight, and that during the time mentioned the defendants conspired and agreed to eliminate and destroy all competition in the transportation business between the Humboldt Steamship Company and the defendant steamship companies by having the Humboldt Steamship Company agree with and enter into a traffic arrangement with the defendant steamship companies wherein and whereby the prices, charges, and rates for the transportation of freight and passengers were fixed and established, and it was adhered to by all parties, and to fix and establish such rates and charges at a point higher than would be naturally charged in case that competition between the companies should be continued and for the purpose of forcing and compelling the Humboldt Steamship Company to enter the combine to maintain fixed rates of transportation and to maintain the same above normal rates under competition, the defendants conspired and agreed to have the railroad company refuse to enter into any joint through traffic arrangement with the Humboldt Steamship Company for the through traffic of passengers and freight and to refuse to recognize the Humboldt Steamship Company as a connecting carrier of the railroad and to have the wharf company charge as wharfage over its said wharf twice as much as was charged for freight transported by any one of the defendant steamship companies and twice as much as was just and reasonable and to have the railroad practice unjust discrimination against the Humboldt Steamship Company in favor of the defendant companies and, if its methods and plots were not sufficient to compel the Humboldt Steamship Company to enter into the combine in restraint of trade and commerce, then to have the said steamship companies reduce rates on passengers and freights to a point where they became unremunerative and by these additional means compel the Humboldt Steamship Company to enter the said combine and agree to abide by such rates for passengers and freight transported as such combine should fix in order to eliminate competition, and that pursuant to the conspiracy the defendants aided and

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abetted one another, each cooperating to the same end for the same purpose with the intent to effect the object of the conspiracy aforesaid; that the railroad during all times mentioned did wrongfully and unjustly refuse to enter into any joint through traffic arrangement with the Humboldt Steamship Company or to recognize the same as a connecting carrier, although the railroad did enter
228 into and maintain joint through traffic arrangements with the defendant steamship companies, and said wharf company did continuously during the period mentioned wrongfully and unjustly charge the sum of two dollars per ton wharfage for all freight handled over its said wharf at Skagway shipped by the Humboldt Steamship Company, although the wharf company during said period charged only one dollar per ton wharfage for any freight handled over its wharf shipped by carriers belonging to either of the defendant steamship companies, and that all wharfage over one dollar is excessive and unjust and local rates for transportation of freight and passengers from Skagway to the northern points on the said railroad were fixed by the said railroad pursuant to such conspiracy and to effect the object of such conspiracy at a much higher rate than was charged or collected by the said railroad company for passengers or freight shipped through from said southern ports to said northern points by any of the defendant steamship companies; and from the first day of November, 1909, to the first day of April, 1910, the defendant steamship companies reduced the rates of transportation on passengers and freight between the southern ports and Skagway and way points sixty per cent of the rates up to that time charged and collected for similar service by said defendant steamship companies, by reason of which the rates for such transportation were and became unremunerative; such rates being made as aforesaid for the purpose of effecting the said conspiracy aforesaid, which said conspiracy aforesaid was in restraint of trade and commerce and for the purpose of enabling the defendant steamship companies to monopolize the transportation business aforesaid.

To each count the defendants interposed a motion to quash substantially the same as in cause No. 836–B, United States of America v. The North Pacific Wharves and Trading Company, a corporation, et al.

229 John Rustgard, Esq., United States attorney, counsel for the Government.

Messrs. Bogle, Graves, Merritt & Bogle, Messrs. Winn & Burton, Messrs. Farrell, Kane & Stratton, Messrs. Shackleford & Bayless, Ira Bronson, Esq., in propria persona, Royal A. Gunnison, Esq., counsel for the defendants.

LYONS, *District Judge:*

In this as in all of the other cases now pending in this court wherein the indictments charge violations of the Sherman Act and the Interstate Commerce act and its amendments, counsel argued the merits of the questions presented without regard to the technical considera-

tion as to whether they should be raised by motion to quash or by demurrer. For the reasons stated in the opinion in cause No. 836–B, United States of America v. The North Pacific Wharves and Trading Company, a corporation, et al., the court will proceed to discuss the objections to the indictment as if the questions were presented by demurrer and not by motion to quash, as the court considers a demurrer the proper remedy to raise the questions involved.

Counts one and two charge violations of sections 2 and 3 of an act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act (26 Stat. L., 209). Counts three and four charge violations of section 1 of an act entitled "An act to further regulate commerce with foreign nations and among the States" (32 Stat. L., 1847), as amended by the act of June 29, 1906 (34 Stat. L., 584). Count five charges violations of section 1 of the Interstate Commerce act as amended (36 Stat. L., 545). Count six charges a violation of section 5440 of the Revised Statutes of the United States. Substan-
230 tially the same facts, however, are charged in counts one, two, three, four, and five, excepting that in count five there is no allegation of discrimination in wharfage charges; but for the purpose of this opinion and in the view taken by the court of the questions involved the first five counts of the indictment will be discussed together, as the reasoning in the determination of the sufficiency of count one to state a crime will apply to all of the other counts in the indictment, except count six. The objection to the indictment on account of the joinder of counts has already been passed upon the court in cause No. 836–B, United States of America v. The North Pacific Wharves and Trading Company, a corporation, et al., adversely to the contention of the defendants. Counts one and two also charge the defendants with a violation of sections 2 and 3 of the Sherman Act; but the facts therein alleged are substantially the same as are alleged in counts three and four, which charge the defendants with discriminating against the Humboldt Steamship Company, and count five, which charges the defendants with a refusal to grant through routing privileges to the Humboldt Steamship Company. It becomes necessary, therefore, for the court to determine whether or not the court has jurisdiction in the first instance to pass upon the questions involved, either in a civil or a criminal action, or whether or not such questions must be first determined by the Interstate Commerce Commission.

The facts charged in each of the first five counts are substantially that the defendants discriminated against other common carriers by inducing the defendant railroad company to enter into through routing arrangements with other carriers than the defendant steamship companies and by inducing the railroad company to charge higher rates for freight carried to Skagway on the Humboldt
231 or by any other carrier not owned by one of the defendant steamship companies, and further that freight carried on vessels of other companies was charged a higher wharfage rate by the

defendant wharf company. There are three cases recently decided by the Supreme Court of the United States which shed a flood of light upon the questions involved on account of the comprehensive discussion of the jurisdiction of the Interstate Commerce Commission in the opinions by the court in those three cases.

In re Texas & Pacific Railroad Co. v. Abilene Cotton Oil Company, 204 U. S. 427, which was an action against the railroad company to recover $1,951.83, the same being claimed to be the excess over a reasonable rate, which the railroad company had charged for transporting freight for the plaintiff; the rate charged by the railroad company being in accordance with its schedule of rates filed with the Interstate Commerce Commission, the court in passing on the question, among other things, said:

"The commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs and accounts and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the district attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the commission to enforce compliance with the act. The act specifically provided that whenever any common carrier, subject to its provisions, shall do, cause to be done or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful or shall omit to do any act, matter, or thing in this act required to be done, such carrier shall be liable to the person, or persons, injured thereby for the full amount of the damages sustained in consequence of any such violation of the provisions of this act. Power was conferred upon the commission to hear complaints concerning violations of the act, to investigate the same, and if the complaints were well founded to direct not only the making of reparation to the injured persons but to order the carrier to desist from such violation in the future. In the event of the failure of the carrier to obey the order of the commission, that body or the party in whose favor an award of reparation was made was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute; prima facie effect in such courts being given to the findings of fact made by the commission."

The court further said on pages 439 to 441:

232 "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows because unless the requirement of the uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard rates fixed in the mode provided by the statute could be treated on the complaint of the shipper by a court and jury as unreasonable

without reference to prior action by the commission finding the established rate to be unreasonable and ordering the carrier to desist in the future in violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable in the opinion of the court and jury and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court when based upon a complaint made by a shipper without previous action by the commission would give rise to a change of the scheduled rate and thus cause the new rate resulting from the action of the court to be applicable in the future as to all. This suggestion, however, is manifestly without merit and only serves to illustrate the absolute destruction of the act and remedial provisions which it created which would arise from a recognition of the right asserted. For if without previous action by the commission power may be exerted by courts and juries generally to determine the reasonableness of the established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to the reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty which the statute casts upon that body of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts independent of prior action by the commission would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibition against preferences and discriminations, and effect, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

The court further said on page 448:

"Concluding as we do that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable, it is unnecessary further to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce."

233 In re Baltimore & Ohio Ry. Co. v. Pitcairn Coal Co., 215 U. S. 492, which was a proceeding by mandamus on the part of the coal company to compel the railroad company to refrain from

discriminating in the distribution of cars among the mine owners, the court used the following language (commencing on page 493):

"When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions. The controversy is controlled by the considerations which govern the ruling made in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. In that case suit was brought in a court of the State to recover because of the exaction by a carrier on an interstate shipment of an alleged unreasonable rate, although the rate charged was that stated in the schedule duly filed and published in accordance with the act to regulate commerce. After great consideration it was held that the relief prayed was inconsistent with the act to regulate commerce, since by that act the rates as filed were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out that any other view would give rise to inexplicable confusion, would create unjust preferences and undue discriminations, would frustrate the purpose of the act, and in effect cause the act to destroy itself. The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906 and when those amendments are considered they render, if possible, more imperative, the construction given to the act by that ruling, since by section 15, as enacted by the amendment of June 29, 1906, the commission is empowered, indeed it is made its duty in disposing of a complaint not only to determine the legality of the practice alleged to give rise to the unjust preference or undue discrimination and to forbid the same, but moreover to direct the practice to be followed as to such subject for a future period not exceeding two years, with power in the commission, if it finds reason to do so, to suspend, modify, or set aside the same; the order, however, to become operative without judicial action. In considering section 15 in the case of the Interstate Commerce Commission v. The Illinois Central Ry. Co., which was decided, ante, page 452, it was pointed out that the effect of the section was to cause it to come to pass that courts in determining whether an order of the commission should be suspended and enjoined were without power to invade the administrative functions vested in the commission and, therefore, could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which lead to the conclusion in the Abilene case that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regu-
234 late commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is

assailed in the courts as unjustly preferential or discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds from the evidence before it that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If on the contrary the commission was bound to follow the previous action of the courts, then it is apparent that its powers to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

The court further said, on page 499:

"This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light and in harmony with the amendments adopted in 1906, the remedy afforded by that section in the cases which it embraces must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require prerequisite exertion of power by that body or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission rendered within the lawful scope of its authority until such orders are set aside by the commission or enjoined by the courts."

In re Robinson v. The Baltimore & Ohio R. R. Co., decided by the Supreme Court of the United States on January 9, 1912, and reported in the advance sheets as No. 17 of the October term, 1911, which was an action by a shipper to recover damage resulting from excessive freight charges for transporting coal, the schedule of rates provided that the railroad company charge fifty cents per ton more for hauling coal when the same was loaded from wagons than it charged when the loading was from a tipple, and the plaintiff claimed that the same was unjust and discriminatory. The court said, among other things:

"It was contended by him in the supreme court of appeals of the State, and is contended now, that the question should be answered in the affirmative because of the provision in section 22 that: 'Nothing in this act contained shall in any way abridge or alter the
235 remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' But it must be ruled otherwise, and for these reasons:

"The act * * * whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences subject to its provisions, also prescribed the manner in which that provision should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing in a prescribed mode schedules of rates

to be charged for the transportation of property over its road; declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act; forbade any deviation from them while they remained in effect; invested the Interstate Commerce Commission with authority to receive complaints against rates so established and to inquire and say whether they were in anywise violative of the provisions of the act, and if so, what, if any, injury had been done thereby to the person complaining or to others; and further authorized the commission to direct the carrier to desist from any violation found to exist and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation by an action in the Circuit Court of the United States if the carrier failed to comply with it. Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to the single tribunal clothed with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules and by due reparation to the injured persons."

The court further said:

"It is true, as was urged in argument, that in that case (referring to the Abilene case) the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory, but the distinction is not material. The power of the commission over the two complaints is the same. One is as likely to become the subject of diverging opinions and conflicting decisions as is the other; and if the court acting originally upon either were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate obligatory upon both carrier and shipper."

The three cases cited establish the following propositions:

First. That no action will lie for the recovery of excessive freight charges, providing such charges are in conformity with the schedule of rates filed with the Interstate Commerce Commission, until the matter has first been submitted to the commission and a ruling from that body obtained.

236 Second. That no mandamus proceedings can be instituted on account of alleged discriminations or preferences until the same has been submitted to the commission and the commission has ruled upon the same unless it be in some instances where the discrimination is so plain and the duty of the carrier so apparent as not to require the exertion of the discretion conferred on the commission by the act to determine whether or not the law has been violated.

Third. That no action will lie for the recovery of alleged excessive rates resulting from discrimination, providing the rates charged are in accordance with the schedule although apparently discriminatory.

It is true the three cases cited are civil cases, but the reasons assigned for the conclusions of the court are equally applicable in criminal cases. Can it be successfully contended that if the defendants in any of those cases had been indicted on account of the alleged unreasonable charges or discrimination that the court would have sustained such indictments? So far as an unreasonable rate is concerned there would have been no standard to guide the jury in determining what is a reasonable rate, for the law says that the scheduled rates are the legal rates binding upon the carrier and only subject to change at the instance of a shipper by the Interstate Commerce Commission or by the Interstate Commerce Commission on its own initiative. Therefore, until the legally constituted authority has determined that the rates are unreasonable they must be held to be the legal rates. And, with reference to the discriminations charged in these cases, it might be that a court or a jury might hold the discriminations undue and unwarranted, while the commission might, after a full consideration of the questions involved, determine
237 that the discriminations were only apparent and were justified by the difference in the conditions, and if the court were to sustain an indictment under such circumstances and the jury should find that the practices or charges were unreasonably discriminatory and the same matter should thereafter be submitted to the commission which might determine that the apparent discriminatory practices were warranted on account of the difference in the circumstances under which the discrimination was granted, would not the defendant, or defendants, have been illegally convicted? The object of the interstate commerce act is to procure equality among shippers and the best method provided for securing equality is by insuring uniformity, and uniformity can only be guaranteed by lodging with one form the power and authority to determine what are reasonable and unreasonable rates and what are undue and unjust discriminatory practices. See Van Patten v. Chicago, M. & St. P. Ry. Co., 81 Federal, 545. On page 533 the court, among other things, said:

"Furthermore, if it be true that the establishment of reasonable rates for railway services is to be left to the verdict of juries rendered long after the services have been performed, it is apparent that it will be wholly impossible to secure equality or uniformity therein and of necessity preferences would result therefrom in favor of individuals and localities, thus violating the most important principal of the act in question."

"Where two connecting lines agree on a joint through rate tariff, such joint tariff or the share of which either takes is not the standard by which to determine whether or not either line violates by its local rates section 3 of the interstate commerce act forbidding undue preference. The undue preference clause of the interstate commerce

act is indefinite and uncertain and a conviction for its violation can not be sustained where the criminality of the act is made to depend on whether the jury think a preference reasonable or unreasonable." Tozier v. United States, 52 Federal, 917; Chicago & N. W. Ry. Co. v. Osborne, 52 Federal, 912.

It is true in this case the Interstate Commerce Commission has refused to include within its jurisdiction the Territory of Alaska, but no complaint can be lodged against these defendants for not
238 having filed their schedules of rates with the Interstate Commerce Commission if the latter refuses to receive them; in fact, the indictment does not charge a refusal on the part of any of the defendants subject to the interstate commerce act to file their schedules in accordance with the act. Nor do any of the counts in the indictment charge that the defendants, or any of them, charged one shipper any greater rate than any other shipper.

Five of the counts in the indictment do charge that the wharf company charged a greater wharfage for freight shipped by boats not owned by the three defendant steamship companies, but as was held in the two cases last cited the rates charged by connecting carriers on freight which has been through routed over such carriers may be less than the sum of the locals and yet not be unduly discriminatory, and it may be that the wharf company charged greater wharfage to companies who had not made through routing arrangements or could not make through routing arrangements with the railroad company, and the wharf company may be legally justified in making such discrimination in its charges. Whether the difference in the rates charged between the freight shipped under through routing arrangements and that shipped under any other arrangement is unduly discriminatory certainly must be a question to be determined and passed upon by the Interstate Commerce Commission, providing the wharf company can be considered an instrumentality of the railroad and subject to the interstate commerce act; and it is the judgment of the court according to the facts charged in the indictment that he wharf is such instrumentality and subject to the act, as held by the United States Supreme Court in re Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S., 498.

239 It is also charged in the indictment that two dollars per ton is an unreasonable wharfage rate; but shall a jury determine that fact in the trial of a criminal action? There are a great many facts to consider in determining what would be and what is an unreasonable wharfage charge and, as before stated, the jury in their finding might differ very materially from the Interstate Commerce Commission after the latter had opportunity to consider and pass upon the question. It seems obvious that the question of unreasonable wharfage rates and the question of discriminatory wharfage rates must be determined by the commission before the court acquires jurisdiction, either in criminal or civil proceedings, to entertain controversies involving the consideration of such questions except in cases where the discrimination is practiced under substantially the

same conditions and circumstances, wherein there would be no justification or reason for two juries differing in opinion as to the legality of the discrimination charged, such as instances where the jury would be required to pass upon the question as to whether the carrier had charged a shipper more than its published rates. If it be true that greater wharfage rates were charged one shipper than were charged another shipper under identical conditions, the question involved would be materially different, for then the jury would have a standard to guide them, to wit: The minimum rates charged for such a service, as was held in the case of the Armour Packing Co. v. United States, 209 U. S., 56; but the various counts in this case show that the difference in the wharfage rates were charged under different conditions: One under through rating arrangements between the steamship carrier and the railroad; and the other in the absence of such through rating arrangements. Counsel for the Government contends that under and by virtue of the following clause found
240 in section 1 of the Interstate Commerce Act as amended (36 Stat. L., 545): "And to establish through routes and just and reasonable rates applicable thereto," the railroad company is obliged to grant through routing privileges to all petitioning connecting carriers. But even if that portion of the section were held to be mandatory, there is no reason for assuming that the carrier, which is the railroad company in this instance, would be compelled to grant through routing privileges to every petitioning carrier. It doesn't follow that it would be compelled to grant through routing privileges with every company proposing to through route with the railroad company. The object of that provision of the statute is to accommodate shippers and it can not be said that it was ever enacted for the purpose of enabling every carrier to force every other connecting carrier to through route with it, no matter what the circumstances might be.

In re Cardiff Coal Co. v. Chicago, M. & St. P. Ry. Co. et al., 13 I. C. C., 461, the commission said, on page 465:

"Under the common law, as has often been said, the establishment by connecting carriers of through routes and joint rates was fundamentally a matter of contract. Railroads can not be compelled to carry traffic beyond their own rails; they can not be compelled to deliver shipments at points on the lines of connecting roads. But the act to regulate commerce, as amended, effects a change in the law in that respect. While the greater part of the traffic of the country is carried on through routes voluntarily established by the connecting lines, the law nevertheless confers upon the commission authority to require carriers to establish such through routes when they have failed or refused voluntarily to do so and when there is no reasonable or satisfactory through route already in existence. The provision in question is found in section 15 of the act and is as follows: 'The commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates, as hereinbefore

provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.' In connection with that provision the language of section 1 must not be overlooked. Carriers are required to establish through routes and just and reasonable rates applicable thereto. The meaning of this latter provision was not discussed on the argument, nor has it had consideration in connection with
241 any other complaint before us. Standing there alone it would seem to impose upon carriers an obligation general in character and universal in application to establish through routes and joint rates between all points; but if the provision be read in connection with the language of section 15 above quoted, we are left with the impression that it is simply the declaration of a general principal, the observance of which may be compelled under section 15 by order of the commission, not in all cases, but only in particular cases specified in the latter section. It will there be noted that the authority of the commission to require the establishment of through routes and joint rates is not unlimited. It can not grant relief when a reasonable or satisfactory through route between the points in question already exists. This limitation has been considered by the commission in two or three cases."

In the amendment to the act to regulate commerce, of June 18, 1910, the limitation referred to was stricken, and the commission is now clothed with power to establish through routing whenever in its judgment the circumstances warrant the same. The provision in section 1 referred to, as is held by the commission in the las case, must be read in conjunction with section 15, which latter section reposes discretionary power in the commission to establish after a hearing through routes and joint classifications. As was said by the Supreme Court in the Abilene, Pitcairn, and Robinson cases, the sections of the act to regulate commerce which give a party aggrieved a right of action against the carrier must be read in conjunction with other provisions of the act, from which the purposes of the whole act may be discovered and the particular sections under which the actions were brought in those cases limited in their scope by other provisions of the act in defining its purposes. Would the railroad company, therefore, have the legal right to grant through routing privileges to the defendant steamship companies and refuse the same privileges to the Humboldt Steamship Company and others? That such a right existed at common law is unquestioned. L. R. &c. Co. v. St. L. &c. Co., 63 Fed., 775; s. c. 65 Fed., 39; O. S. L. Co. v. N. P. R. Co., 51 Fed., 465; C. & N. W. Co. v. Osborne, 52 Fed., 912; P. & S. Co. v. A. T. & S. F. Co., 73 Fed., 438; G. C. & S. R. Co. v. S. S. Co., 86 Fed., 407; Central Stock Yards Co. v. L. & N. R. Co., 118 Fed., 113;
242 U. S. v. N. P. R. Co., 188 Fed., 113; A. T. & S. F. R. Co. v.

D. &c. Co., 110 U. S., 667; S. P. R. Co. v. I. C. C. Co., 200 U. S., 536; I. C. C. Co. v. N. P. Co., 216 U. S., 538.

"A common carrier engaged in interstate commerce may at common law and under the interstate commerce law demand prepayment of freight charges when delivered to it by one connecting carrier without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier. Such carrier may enter into a contract with one connecting carrier for through transportation, through joint tariff, through billing, and for the division of the through rates without being obligated to enter into a similar contract with another connecting carrier." Gulf, C. & S. F. Ry. Co. et al. v. Miami S. S. Co., 86 Fed., 407.

The case last above cited was an action by the Miami Steamship Company against the Gulf, Colorado & Santa Fe Railway Company and others, to restrain the defendants from entering into a through rating arrangement with the Mallory Steamship Line from Galveston to New York, and refusing to make the same arrangements with the plaintiffs. The facts charged in the complaint are very similar to the facts charged in the first five counts of the indictment in this case, but the court held that the through routing privileges were a matter of contract between the connecting carriers and that the facts charged in the complaint did not constitute a violation of the Sherman Act. It is true the court held that in any event the plaintiff would not be entitled to injunctive relief under the statute, but on page 422 the court used the following language:

"We conclude that the several arrangements effected between the Mallory Line and the defendant railroad companies are not violative of the common law; that the case attempted to be made in the appellee's bill of complaint in the circuit court can not be maintained under the interstate commerce act."

And the Supreme Court of the United States in re Standard Oil Co. v. United States, 221 U. S. 1, held that only such restraints
243 as were denounced by common law are made criminal by the Sherman Act.

See also Interstate Commerce Commission v. Northern Pacific Railway Co., 216 U. S., 538, wherein the court said:

"When a through route exists which is reasonable and satisfactory, the fact that the public would prefer a second route which is no shorter or better can not overcome the natural interpretation of the provision in the statute to the effect that jurisdiction exclusively depends upon the fact that no reasonable or satisfactory route exists."

It is true that since the rendition of that decision the interstate commerce act was amended by the act of June 18, 1910, and that opinion was rendered in March, 1910; long after, however, the amendment to the interstate commerce act of June 29, 1906, which amendment included the provision in section 1 to the effect that carriers shall establish through routes and just and reasonable rates applicable thereto. It can not be said, however, in the light of the

ruling of the court in the case last cited that the carrier is compelled to grant through routing privileges to every other connecting carrier, for as it was held in that case the Supreme Court refused to force the Northern Pacific Railway Company to grant through routing privileges to the Union Pacific Railway Company from Portland to Seattle, for as the court said in that case the facts disclosed a satisfactory through route by way of the Northern Pacific; that is, a route which was reasonably satisfactory to the traveling public, not one that might be satisfactory to a competing carrier. Under the interstate commerce act, as amended in 1910, the Interstate Commerce Commission has the power and it becomes its duty to establish through routes and through routing privileges, but only after a hearing. It can not be assumed that the Interstate Commerce Commission will force a defendant railroad company to grant through routing privileges to every connecting carrier who might petition for such privilege without imposing any conditions upon such petitioning carrier.

244 "In the amendment of 1910, this provision as to the reasonableness of an existing route was stricken out, and the commission was given authority to establish either on a complaint or upon its own initiative through routes and joint classifications and joint rates and the terms and conditions under which those through routes shall be established whenever the carrier shall have failed or refused to voluntarily establish such through routes and classifications and joint rates." Judson on Interstate Commerce, 2d Edition, section 373.

"The law does not require the commission in all cases where no through routes or joint rates exist to establish them, but only empowers its to do so in proper cases with the intent of giving effect to the general purposes of the act by securing reasonable facilities to the public and preventing unreasonable and unjust rates, practices, and discriminations. In the exercise of this authority the commission is bound by the same considerations of justness and fairness as it is in the exercise of the law giving power in other respects. Where neither the interest of the public nor the ends of justice, as between the parties directly interested, will be promoted by the establishment of through routes and joint rates and the division thereof, the commission will refuse to exercise the authority conferred upon it with respect to establishing such routes and rates." Barnes, Interstate Transportation, section 181–E; Loup Creek Colliery Co. v. Virginia Ry. Co., 12 I. C. C., 471.

"Where a railroad company is ordered by the commission to establish with a connecting carrier a through route and joint rate: Held that if for any reason the railroad company conceives that it would incur risk of loss because of the financial ability of the connecting carrier, the commission would provide as one of the terms under which the through route was to be operated that the connecting carrier should give to the railroad company a suitable bond of indemnity." Barnes, Interstate Transportation, section 182.

Under section 15 of the act to regulate commerce as amended, the commission is not authorized to establish through routing and force carriers to through route with connecting carriers until after a hearing and a determination that the circumstances warrant such through routing and, as stated by Barnes, the commission then has the authority to impose such conditions upon the petitioning and connecting carrier as will in its judgment protect the carrier which objects to granting such through routing privilege. It follows, therefore,
245 that if the question of through routing were submittted to a court or jury, in either a civil or a criminal proceeding, different courts and different jurors might entertain divergent opinions with respect to the same state of facts, and the jury might find a defendant guilty for refusing to through route under such circumstances and conditions as would cause the Interstate Commerce Commission to refuse to grant such privileges to a petitioning carrier. At common law, as will be conceded, the granting of through routing and billing was a question of contract between connecting carriers and not subject to coercion by the courts. The Interstate Commerce Act as amended lodges the power in the commission to force connecting carriers to grant each other through routing privileges whenever the circumstances will, in the judgment of the commission, warrant such provision; but the common law is modified in that respect only to the extent of granting such power to the Interstate Commerce Commission; not to the extent of conferring such jurisdiction upon the courts, except for the purpose of enforcing the orders of the commission.

"Where a railroad company entered into a contract with complainant that in consideration of complainant's establishment of a cement factory on its line with a capacity of not less than six hundred barrels a day, the carrier's regular established tariff rates on cement during a specified period should not exceed those set out in their schedule, complainant in a suit to restrain the railroad company from establishing and filing higher rates than those obtained in the schedule can not obtain such relief in the courts in the advance of a finding by the Interstate Commerce Commission on the issue whether the subsequent rates were reasonable or unreasonable, to be determined in the light of the railroad's operation as an entirety." Sandusky Portland Cement Co. v. Baltimore & Ohio Ry. Co., 107 Federal, 583.

The only authority submitted by the Government that seems to in any way conflict with the views herein expressed is the opinion
246 in the case of the United States v. Vacuum Oil Co., 153 Federal, 605, wherein the court held an indictment good which charged discrimination by the defendant against certain localities, although the same matter had not been previously submitted to the Interstate Commerce Commission. The opinion in that case, while rendered subsequent to the opinion in the Abilene case, was rendered prior to the Pitcairn and Robinson cases, and the views expressed by the district court in the Vacuum Oil case seems clearly

in conflict with the opinions announced in the Abilene, Pitcairn, and Robinson cases; and while the court holds that the reasoning in the Abilene case is not applicable to the questions presented in the Vacuum Oil case, no reasons are given by the district court in the opinion in that case which seem to warrant the conclusion that the holding is not in conflict with the opinion in the Abilene case. In the light of the ruling, however, in the Pitcairn and Robinson cases decided by the Supreme Court of the United States subsequently to the Vacuum Oil case, it seems reasonably obvious that the conclusions reached by the district court in the Vacuum Oil case are not in harmony with the views expressed by the Supreme Court in the three other cases mentioned.

It follows that the court is without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment, in either a criminal or a civil proceeding, until such matters have been submitted to and passed upon by the Interstate Commerce Commission. The demurrers to the first five counts of the indictment must therefore be sustained.

The same reasoning, however, does not apply to the sixth count in the indictment so far as the defendant corporations are concerned. That count charges the defendants with a violation
247 of section 5440 of the Revised Statutes of the United States, known as the "conspiracy" statute. It is alleged that the defendants conspired to force the Humboldt Steamship Company to enter into an agreement with the defendants for the purpose of maintaining rates and suppressing competition among common carriers between the southern ports named in the indictment and Skagway, Alaska. The indictment clearly states facts showing a violation of section 3 of the Sherman Act. Counsel for the defendants contend that count six is bad for the reason that it charges a conspiracy to conspire, which they contend is inconceivable and cite to sustain such contention United States v. Deitrich, 126 Federal, 666; United States v. N. Y., &c., Co., 146 Federal, 298; Clarke v. United States, 156 Federal, 902. But Judge Morrow entertained and held good a similar indictment in re United States v. Cassidy, 67 Federal, 701. The objection is technical, and in any event the count charges sufficient facts to show a violation of section 3 of the Sherman Act and the language of the indictment charging a violation of section 5440, supra, may be treated as surplusage.

"The substance of the allegations of the county, which is not in apt technical language, is that the parties indicted agreed to burn an elevator of one Peter Hoyt and in pursuance of that agreement did burn it. The conspiracy to burn is merged in the consummated act of burning and so the offense charged is that of arson only, and not the independent offense of a conspiracy to commit arson and arson." Hoyt v. The People, 16 L. R. A., 239.

The demurrers, therefore, to the sixth count so far as the defendant corporations are concerned should be overruled.

But the demurrers to count six of the indictment as to the individual defendants must be sustained, for the specific facts charged in count six only apply directly to the defendant corporations. The indictment fails to charge that the individual defendants were either officers or agents of the defendant corporations or that the acts
248 complained of were performed by and through the individual defendants acting as officers or agents of the defendant corporations. It is true the corporations must have conspired to suppress competition and to restrain trade and commerce through its officers or agents, but in the absence of an allegation to the effect that such conspiracy was formed by the corporations through the individual defendants it must be inferred that such conspiracy was entered into by the corporations through agents and officers other than the individual defendants. It is true that count six charges that pursuant to said conspiracy the said defendants aided and abetted one another, each co-operating to the same end and for the same purpose and with the intent to effect the object of said conspiracy as aforesaid. But, in what manner did the individual defendants aid and abet the other defendants in forwarding or perfecting the conspiracy to restrain trade and commerce as charged in the indictment? If it were alleged that they acted as agents or officers of the defendant corporations in doing the things charged, then the individual defendants would be apprized of what they would be expected to meet on the trial, but in the absence of any such allegation in the indictment, the mere charge that all of the defendants aided and abetted each other is too indefinite and must be construed as a mere conclusion of law; for, if the acts and things done by the individual defendants which the pleader conceives to constitute aiding and abetting were fully set forth the court might determine that such acts would not constitute an aiding and abetting on the part of the individual defendants. In what way did they aid and abet? By words of encouragement; by actually assisting the corporate defendants in effecting the conspiracy; or did they aid and abet
249 such conspiracy by agreeing to refuse to ship freight on the steamship "Humboldt"? The law presumes that every man is innocent of the crime charged against him in the indictment, and assuming that the individual defendants are innocent of any charge of aiding and abetting in the conspiracy described, what is there in the indictment to apprize them of what acts may be proved against them on the trial? There is no allegation charging them with any specific acts. The general charge is made that they aided and abetted the other defendants. The indictment is silent as to the manner in which such aid was rendered.

"An indictment is well enough that states facts which constitute a crime, and in language which leaves no doubt in the minds of the defendants of what they are accused. It is true that a defendant should be informed clearly by the indictment of the exact and full charge made against him, yet the manner in which the information is given is unimportant. An indictment is sufficient when it contains

a substantial accusation of crime, and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same offense, and when from it the court can determine that the facts charged are sufficient in law to support a conviction." United States v. Swift, 188 Federal, 92.

Tested by the above language the sixth count of the indictment is fatally defective as to the individual defendants, and as to them and each of them the demurrers to the same are sustained.

Let an order be entered in accordance herewith.

Given in open court at Juneau, Alaska, this 29th day of April, 1912.

THOMAS R. LYONS, *Judge.*

250 [Endorsed.] Form No. 680. No. 837-B. In the District Court of the United States for the Div. No. 1 of Alaska. United States of America v. Pacific and Arctic Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher. Opinion. Filed, Apr. 29, 1912. E. W. Pettit, clerk. By ——— ———, deputy.

251 In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES vs. PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation, et al.	No. 837-B. Order.

The motion of the Pacific and Arctic Railway and Navigation Company, a corporation, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant corporation; and the court being now fully advised in the premises denies said motion, to which ruling of the court defendant, by counsel, excepts and the exception is allowed.

Thereupon the motion of the Pacific Coast Steamship Company, a corporation, to quash and set aside the indictment herein having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and W. S. Bayless, Esquire, appearing

for said defendant corporation; and the court being now fully advised in the premises, denies said motion, to which ruling of the court defendant, by counsel, excepts and the exception is allowed.

Thereupon the motion of the Alaska Steamship Company, a corporation, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and J. R. Winn, Esquire, appear-
252 ing for said defendant corporation; and the court being now fully advised in the premises, denies said motion, to which ruling of the court the defendant, by counsel, excepts and the exception is allowed.

Thereupon the motion of the Canadian Pacific Railroad Company, a corporation, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant corporation; and the court being now fully advised in the premises, denies said motion, to which ruling of the court defendant excepts, and the exception is allowed.

Thereupon the motion of The North Pacific Wharves & Trading Company, a corporation, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant corporation; and the court being now fully advised in the premises, denies said motion, to which ruling of the court defendant corporation, by counsel, excepts, and the exception is allowed.

Thereupon the motion of defendant Ira Bronson to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant; and the court being now fully advised in the premises denies said motion, to which ruling the defendant excepts and the exception is allowed.

Thereupon the motion of defendant J. H. Bunch to
253 quash and set aside the indictment herein having been heretofore presented, argued, and taken under advisement, comes on regularly at this time, John Rustgard, United States attorney, appearing for the Government, and J. R. Winn, Esquire, appearing for said defendant; and the court being now fully advised in the premises, denies said motion, to which ruling defendant excepts and the exception is allowed.

Thereupon the motion of defendant J. C. Ford, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and W. S. Bayless, Esquire, appearing for said defendant; and the

court being now fully advised in the premises, denies said motion; to which ruling defendant excepts and the exception is allowed.

Thereupon the motion of defendant G. H. Higbee, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and W. S. Bayless, Esquire, appearing for said defendant; and the court being now fully advised in the premises, denies said motion; to which ruling defendant excepts and the exception is allowed.

Thereupon the motion of defendant C. E. Wynn Johnson, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant; and the court being now fully advised in the premises, denies said motion; to which ruling the defendant excepts and the exception is allowed.

254 Thereupon the motion of defendant Charles E. Peabody, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant; and the court being now fully advised in the premises, denies said motion; to which ruling said defendant excepts and the exception is allowed.

Thereupon the motion of defendant E. C. Ward, to quash and set aside the indictment herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and W. S. Bayless, Esquire, appearing for said defendant; and the court being now fully advised in the permises, denies said motion; to which ruling defendant excepts and the exception is allowed.

Thereupon the motion of F. B. Wurzbacher, one of the defendants herein, to quash and set aside the indictment filed herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and R. A. Gunnison, Esquire, appearing for said defendant; and the court being now fully advised in the premises, denies said motion; to which ruling the defendant excepts and such exception is allowed.

Thereupon the motion of defendant J. H. Young, to quash and set aside the indicement herein, having been heretofore presented, argued, and taken under advisement, comes on regularly at this time; John Rustgard, United States attorney, appearing for the Government, and J. R. Winn, Esquire, appearing for said defendant; and the court being now fully advised in the premises, denies said motion; to which ruling the defendant excepts and such exception is allowed.

Dated, Monday, April 29, 1912.

THOMAS R. LYONS, *Judge.*

255 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA *vs.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher.	No. 837. Demurrer to indictment.

Comes now into court the said defendant Pacific and Arctic Railway and Navigation Company by its attorneys, Bogle, Graves, Merritt & Bogle, and Royal A. Gunnison, and having heard read the indictment, demurs thereto and to each and every count thereof and for grounds of demurrer says:

COUNT ONE.

That count one of said indictment and the matters and facts therein as therein alleged and set forth are not sufficient in law to compel it, the said defendant to answer thereto for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said district of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

256 3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards the particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action.

11. The court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offense of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge made.

16. That said count is in other respects informal, insufficient, and defective.

257 And this it, the said defendant Pacific and Arctic Railway and Navigation Company, is ready to verify.

Wherefore defendant prays judgment that by the court it be discharged and dismissed of said count one of said indictment.

COUNT TWO.

That count two of said indictment and the matters therein as therein alleged are not sufficient in law to compel the said defendant to answer thereto for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards the particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

258 11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offense of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge made.

16. That said count is in other respects informal, insufficient, and defective.

And this the said Pacific and Arctic Railway and Navigation Company, defendant, is ready to verify.

Wherefore defendant prays judgment that by the court it be discharged and dismissed of said count two of said indictment.

COUNT THREE.

That count three of said indictment and the matters therein as therein alleged are not sufficient in law to compel him, the said defendant, to answer thereto for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

259 3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offense of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge.

260 16. That said count is in other respects informal, insufficient, and defective.

And this it, the said Pacific and Arctic Railway and Navigation Company, defendant, is ready to verify.

Wherefore defendant prays judgment that by the court it be discharged and dismissed of said count three of said indictment.

COUNT FOUR.

That count four of said indictment and the matters therein as therein alleged are not sufficient in law to compel it, the said defendant, to answer thereto, for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

261 11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offense of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge.

16. That said count is in other respects informal, insufficient, and defective.

And this the said defendant Pacific and Arctic Railway and Navigation Company is ready to verify.

Wherefore defendant prays judgment by the court that it be dismissed of the fourth count of said indictment.

COUNT FIVE.

That count five of said indictment and the matters therein, as therein alleged, are not sufficient in law to compel it, the said defendant, to answer thereto, for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged, because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

262 3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

12. That the court has no jurisdiction over the person of said defendant.

13. That said count does not allege any offense of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge.

16. That said count is in other respects informal, insufficient, and defective.

263 And this it, the said Pacific and Arctic Railway and Navigation Company, defendant, is ready to verify.

Wherefore defendant prays judgment by the court that it be discharged and dismissed of said count five of said indictment.

COUNT SIX.

That count six of said indictment and the matters therein as therein alleged are not sufficient in law to compel it, the said defendant, to answer thereto, for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crime charged because the same is not triable within said District of Alaska.

2. That said count does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said count do not constitute a crime.

4. That said count is not direct or certain as it regards the party charged.

5. That said count is not direct or certain as it regards the crime charged.

6. That said count is not direct or certain as it regards any particular circumstances of the crime charged.

7. That said count charges more than one crime.

8. That said count fails to charge but one crime and in one form only.

9. Said count fails to sufficiently show that the crime charged was committed within the jurisdiction of said court.

10. Said count fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said count.

264 12. That the court has no jurisdiction over the person of said defendant.

13. That the said count does not allege any offense of which this court has jurisdiction.

14. That said count is irregular and void upon its face.

15. That said count is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge.

16. That said count is in other respects informal, insufficient, and defective.

And this it, the said Pacific and Arctic Railway and Navigation Company, defendant, is ready to verify.

Wherefore defendant prays judgment that by the court it be discharged and dismissed of said sixth count of said indictment.

ENTIRE INDICTMENT.

And it, the said defendant, by its attorneys, having heard the indictment read, says that said indictment and every count thereof and the matters and facts therein alleged are not sufficient in law to compel it to answer thereto, for that:

1. It appears upon the face thereof that the grand jury by which said indictment was found had no legal authority to inquire into the crimes therein charged, or any of them, because the same, or any of them, are not triable within said District of Alaska.

2. That said indictment does not charge or allege facts against said defendant sufficient to constitute an offense or the violation of any law by the defendant.

3. That the facts stated in said indictment do not constitute a crime.

265 4. That said indictment is not direct or certain as it regards the party charged.

5. That said indictment is not direct or certain as it regards the crime charged.

6. That said indictment is not direct or certain as it regards the particular circumstances of the crime charged.

7. That said indictment charges more than one crime.

8. That said indictment fails to charge but one crime and in one form only.

9. That said indictment fails to sufficiently show that the crimes charged, or any of them, were committed within the jurisdiction of said court.

10. That said indictment fails to show the crime charged or any of them were committed within the time limited by law for the commencement of an action therefor.

11. That the court has no jurisdiction over the subject matter of said indictment.

12. That the court has no jurisdiction over the person of said defendant.

13. That said indictment does not allege any offense of which this court has jurisdiction.

14. That said indictment is irregular and void upon its face.

15. That said indictment is fatally defective because of ambiguity, duplicity, multifariousness, and because the same is involved and contains many redundant, irrelevant, and immaterial allegations which are in no manner connected with the specific charge upon which said count is based, and that the same wholly lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts or the character of the evidence which he will be required to meet upon the trial on the specific charge.

16. That said indictment is in other respects informal, insufficient, and defective.

266 17. That said indictment is bad for multifariousness and duplicity.

18. That said indictment as a whole is needlessly long, involved, ambiguous, and uncertain, containing many redundant, irrelevant, and immaterial allegations, rendering the same unintelligible and difficult and impossible of construction, and that the same is lacking in that degree of certainty of averment essential to a good indictment and wholly fails to clearly inform the defendant of the character and nature of the offense with which it is charged, or the character of the evidence which it will be called upon to meet, so as to enable it to intelligently prepare for trial.

19. That said indictment contains several charges against said defendant, but that said charges are not for the same act or transaction, nor for two or more acts or transactions which are connected together, nor for two or more acts or transactions of the same class of crimes or offenses.

20. That said indictment is fatally defective and insufficient in that it does not allege the acts or omissions charged as the various crimes in the several counts thereof with such degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

All of which it, the said defendant, Pacific and Arctic Railway and Navigation Company, is ready to verify.

Wherefore defendant prays that it be by the court dismissed and discharged of said indictment.

BOGLE, GRAVES, MERRITT & BOGLE,
ROYAL A. GUNNISON,
Attorneys for Defendant.

I, Royal A. Gunnison, an attorney of said court and one of the attorneys of said defendant, hereby certify that I have carefully examined the foregoing demurrer and the merits thereof and believe the same to be well taken in point of law.

ROYAL A. GUNNISON.

267 [Endorsed:] No. 837–B. In the United States District Court for the District of Alaska, division No. 1. United States of America vs. Pacific and Arctic Railway and Navigation Company, a corporation, et al. Demurrer of the defendant Pacific and Arctic Railway and Navigation Company, a corporation, to indictment. Bogle, Graves, Merritt & Bogle, Royal A. Gunnison, attorneys for said defendant. Filed Apr. 29, 1912. E. W. Pettit, clerk, by ——— ———, deputy.

437 In the United States District Court for the District of Alaska, Division Number One.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.	No. 837–B. Order sustaining and overruling demurrers.

This matter coming on for hearing upon the demurrers of each of the defendants herein to said indictment and to each and every count thereof, and the court having heard arguments by Ira Bronson, Esq., Royal A Gunnison, Esq., W. H. Bogle, Esq., John R. Winn, Esq., and W. D. Stratton, Esq., counsel for said defendants, in support of the said demurrers, and John Rustgard, Esq., United States attorney, in opposition thereto, and the court having taken the matter under advisement and having on the 29th day of April, A. D. 1912, rendered and filed its written opinion and decision upon said demurrers;

Now, therefore, it is ordered that said demurrers and each of them be and it hereby is as to each defendant sustained as to counts numbered 1, 2, 3, 4, and 5 of said indictment; that the said demurrers on behalf of C. E. Wynn Johnson, Ira Bronson, J. C. Ford, Charles E. Peabody, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher also as to count six in said indictment is sustained;
but that as to the said count six said demurrers on behalf of the
438 said defendants, the said Pacific and Arctic Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; and the North Pacific Wharves and Trading Company, a corporation, are and each is overruled and disallowed. This order is based upon the grounds specifically set out in the written opinion and decision of this court rendered and filed herein on the said 29th day of April, A. D. 1912. To which ruling as to each of the said demurrers herein the plaintiff duly excepts and each exception is duly allowed by the court. And to each ruling as to count 6 also the above named defendant corporations, each for itself, duly excepts and each exception is duly allowed by the court. The defendants and each and all of them except to the form of this order and exception is allowed.

Done in open court this 3rd day of May, A. D. 1912.

THOMAS R. LYONS,
District Judge.

Entered Court Journal.
No. D, pages 202–3.

[Endorsed:] Form No. 680. No. 837–B. In the District Court of the United States for the District of Alaska, division No. one. United States of America vs. Pacific and Arctic Railway and Navigation Company, a corporation, et al. Order sustaining and overruling demurrers. Filed May 3, 1912. E. W. Pettit, clerk.

439 In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES *vs.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, a corporation, et al.	No. 837–B. Order.

Upon application of John Rustgard, United States attorney, the Government is given sixty days in which to prepare and present its bill of exceptions herein. Dated Friday, May 3, 1912.

THOMAS R. LYONS, *Judge.*

440 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.

No. 837–B. Assignment of errors.

The plaintiff in this action, in connection with said plaintiff's petition for a writ of error, makes the following assignment of errors which plaintiff avers occurred upon the hearing and ruling on the demurrer to the indictment and the several counts thereof herein filed by the defendants herein, to wit:

I. The court erred in holding and ruling that where persons enter into a combination to restrain and monopolize trade and commerce, if the acts to be done by them in effecting such combination constitute a violation of the interstate commerce laws, such persons can not be indicted for violating the antitrust law of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Statutes at Large, 209), until after an investigation and determination by the Interstate Commerce Commission.

II. The court erred in sustaining the demurrer to count
441 one of the indictment herein and in holding that the facts stated therein do not constitute a charge against the defendants of a crime under the said antitrust law entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (26 Statutes at Large, 209.)

III. The court erred in sustaining the demurrer to count two of the indictment herein and in holding that the facts stated therein do not constitute a charge against the defendants of a crime under the said antitrust law entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (26 Statutes at Large, 209.)

IV. The court erred in holding that an indictment will not lie on the facts set forth in count three of the indictment charging unjust discrimination in the transportation of passengers and freight until

the facts have been presented to and passed upon by the Interstate Commerce Commission.

V. The court erred in sustaining the demurrer to count three of the indictment and in holding that the facts set forth therein do not constitute a charge against the defendants of a crime under the interstate commerce laws.

VI. The court erred in holding that an indictment will not lie on the facts set forth in count four of the indictment charging unjust discrimination in the transportation of passengers and freight until the facts have been presented to and passed upon by the Interstate Commerce Commission.

VII. The court erred in sustaining the demurrer to count four of the indictment herein and in holding that the facts set forth therein do not constitute a charge against the defendants of a crime under the interstate commerce laws.

VIII. The court erred in holding that it is no crime as charged in count five of the indictment to refuse to establish through routes and make through rates until an order to that effect has been made by the Interstate Commerce Commission.

IX. The court erred in sustaining the demurrer to count
442 five of the indictment herein and in holding that the facts set forth therein do not constitute a charge against the defendant of a crime under the interstate commerce laws.

X. The court erred in holding that after the defendant, Pacific and Arctic Railway and Navigation Company, had refused to establish through routes and through rates with the Humboldt Steamship Company an indictment would not lie for unjust discrimination in charging a greater wharfage rate on freight carried by said Humboldt Steamship Company than on freight carried by the defendants with which it had established such through routes and made such through rates until after the Interstate Commerce Commission had determined that such discrimination was undue.

XI. The court erred in holding that the defendant, Pacific and Arctic Railway and Navigation Company, was not bound by law to make through routing and through rating arrangements with the said Humboldt Steamship Company.

XII. The court erred in holding that the averments of the sixth count herein are not sufficient to charge the individual defendants herein with conspiring to commit a crime against the United States.

Wherefore the plaintiff prays that the judgment of the said district court herein may be reversed.

JOHN RUSTGARD,
United States Attorney,
ROY V. NYE,
Assistant United States Attorney,
Attorneys for Plaintiff.

443 [Endorsed:] Form No. 680. No. 837-B. In the District Court of the United States for the District of Alaska, Division

No. One. United States of America vs. Pacific and Arctic Railway and Navigation Co. et al. Assignment of errors. Filed, June 1, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

444 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.	No. 837–B. Petition for writ of error.

And now come John Rustgard, United States attorney, and Roy V. Nye, assistant United States attorney, for and in behalf of the United States of America, the plaintiff herein, and say that on or about the 3rd day of May, 1912, this court entered judgment herein in favor of the defendants and against the plaintiff, in which judgment in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff by its said attorneys, prays that a writ of error may issue in this behalf out of the United States
445 Supreme Court for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said United States Supreme Court.

JOHN RUSTGARD,
United States Attorney.
ROY V. NYE,
Assistant United States Attorney.

[Endorsed:] Filed June 1, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

446 [Endorsed:] Form No. 680. No. 837–B. In the District Court of the United States for the District of Alaska, division No. one, United States of America vs. Pacific and Arctic Railway and Navigation Co. et al. Petition for writ of error. Filed June 1, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

447 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.

No. 837–B. Order allowing writ of error.

This first day of June, A. D. 1912, came the plaintiff by its attorneys, and filed herein and presented to the court its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by the plaintiff, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error prayed for in said petition.

THOMAS R. LYONS,
District Judge.

448 [Endorsed:] Form No. 680. No. 837–B. In the District Court of the United States for the District of Alaska, division No. one. United States of America vs. Pacific and Arctic Railway and Navigation Co. et al. Order allowing writ of error. Filed June 1st, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

449 In the United States District Court for the District of Alaska, Division Number One.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable judge of the District Court for the District of Alaska, division number one, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, between the United States of America, plaintiff, and Pacific and Arctic

Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants, a manifest error hath happened, to the great damage of the said United States of America, plaintiff, as by the complaint of said United States of America appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court together with this writ, so that you have the same at Washington, D. C., in said United States Supreme Court, on the first day of July next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may
450 cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this first day of June in the year of our Lord one thousand nine hundred and twelve, and of the independence of the United States of America the one hundred and thirty-sixth.

Allowed by

THOMAS R. LYONS,
District Judge of the District of Alaska, Division Number One.

Attest: G. W. PETTIT,
Clerk of the District Court of the District of Alaska. Division Number One.
By E. S. STACKPOLE,
Deputy Clerk.

451. No. 837-B. In the District Court of the United States for the District of Alaska, division No. One. United States of America vs. Pacific and Arctic Railway and Navigation Co. et al. Writ of error. Filed June 1st, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

452 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.	No. 837–B. Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pacific and Arctic Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, greeting:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, D. C., on the first day of July next, pursuant to a writ of error filed in the clerk's office of the District Court for the District of Alaska, division number one, wherein the
453 United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas R. Lyons, district judge of the District Court for the District of Alaska, division number one, at Ketchikan, in said District of Alaska, this first day of June, in the year of our Lord one thousand nine hundred and twelve and of the independence of the United States of America the one hundred and thirty-sixth.

THOMAS R. LYONS,
District Judge.

454 MARSHAL'S RETURN.

UNITED STATES OF AMERICA, *District of Alaska, Division No. 1, ss:*

I hereby certify and return that I received the within citation on the 8th day of June, 1912, at Juneau, Alaska, and that I served the same on the 8th day of June, 1912, at Juneau, Alaska, by delivering a copy of said citation, together with copies of assignment of errors, writ of error, order extending to file record, to John B. Marshall, attorney at law, he, the said John B. Marshal, being then and there partner of R. A. Gunnison, attorney at law, and known as Gunnison & Marshall, attorneys at law, and the said Gunnison & Marshal being there and then attorneys for the following within-named defendants: Pacific and Arctic Railway and Navigation Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; C. E. Wynn-Johnston, E. E. Billinghurst, Ira Bronson, Charles E. Peabody, and Frank Wurzbacher, personally and in person. Also by delivering a copy of said citation, together with copies of assig'-ment of errors, writ of errors, and order extenting to file record, to W. S. Bayless, attorney at law, he, the said W. S. Bayless, being then and there partner of L. P. Shackleford, attorney at law, and known as Shackleford & Bayless, attorneys at law, and the said Shackleford & Bayless, being then and there attorneys for the following within-named defendants: Pacific Coast Steamship Company, a corporation; G. H. Higbee, E. C. Ford, and E. C. Ward, personally and in person. And also, by delivering a copy of said citation, together with copies of assig'ment of errors, writ of error, and order extending to file record, to N. L. Burton, attorney at law, he, the said N. L. Burton, being then and there partner of J. R. Winn, attorney at law, and known as Winn & Burton, attorneys at law, and the said

455 Winn & Burton, being then and there attorneys for the following within-named defendants: Alaska Steamship Company, a corporation; J. H. Bunch and J. H. Young, personally and in person.

Dated at Juneau, Alaska, June 15, 1912.

Marshal's fees: 3 services, $9.00.

H. L. FAULKNER,
United States Marshal.
By HECTOR MCLEAN,
Office Deputy.

456 No. 837-B. In the District Court of the United States for the District of Alaska, division No. one. United States of America vs. Pacific and Arctic Railway and Navigation Co. et al. Citation. Filed June 1st, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

457 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnston, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants.

No. 837–B. Order extending time within which to file record.

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until and including the first day of August, A. D. 1912.

Done this first day of June, A. D. 1912.

THOMAS R. LYONS, *District Judge.*

458 [Endorsed:] Form No. 680. No. 837–B. In the District Court of the United States for the District of Alaska, division No. one. United States of America vs. Pacific and Arctic Railway and Navigation Co. et al. Order extending time within which to file record. Filed June 1st, 1912. E. W. Pettit, clerk. By E. S. Stackpole, deputy.

459 In the United States District Court for the District of Alaska, Division Number One.

UNITED STATES OF AMERICA
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company et al.

No. 837–B. Praecipe.

The clerk of the United States District Court will certify to the Supreme Court of the United States true and full copies of the following papers:

Indictment.
Demurrers to the indictment.
Motions to quash.
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Journal entries.
Certificates of service of appeal papers.

This 10th day of June, A. D. 1912.

JOHN RUSTGARD, *United States Attorney.*

[Endorsed:] No. 837–B. In the United States District Court for the District of Alaska, division number one. United States
460 of America vs. Pacific and Arctic Railway and Navigation Company et al. Praecipe. Filed June 10, 1912. E. W. Pettit, clerk. By ——— ———, deputy.

461 In the District Court for the District of Alaska, division number one, at Juneau.

UNITED STATES OF AMERICA, PLAINTIFF AND PLAINTIFF in error,
vs.
PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants and defendants in error. } No. 837–B.

CERTIFICATE.

I, E. W. Pettit, clerk of the District Court for the District of Alaska, division number one, do hereby certify that the above and foregoing and hereto attached four hundred and sixty pages of typewritten and written matter, numbered from one to four hundred and sixty, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record in cause No. 837–B, wherein the United States of America is plaintiff and plaintiff in error; and Pacific and Arctic Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a

corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher are defendants and defendants in error.

I do further certify that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof
462 in accordance therewith.

I further certify that this transcript was prepared by me in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 17th day of June, A. D. 1912.

E. W. PETTIT,
Clerk of District Court, Dist. of Alaska, Division No. 1.

463 In the Supreme Court of the United States. October term, 1912.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE PACIFIC & ARCTIC RAILWAY & NAVIGATION COMPANY et al. } No. 697.

STIPULATION AS TO PRINTING OF TRANSCRIPT OF RECORD.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit all motions to quash and set aside the indictment, except the motion of the Pacific & Arctic Railway & Navigation Company to quash (pages 52 to 63, inclusive) and all demurrers except the demurrer of the Pacific & Arctic Railway & Navigation Company (pages 255 to 267, inclusive), the other thirteen motions to quash and demurrers being substantially similar thereto.

WM. MARSHALL BULLITT,
Solicitor General.
MARVEN THOMPSON,
Counsel for Defendant in Error.

AUGUST 6, 1912.

464 File No. 23,272. Supreme Court U. S. October term, 1912. Term No. 697. The United States, plff. in error, vs. The Pacific & Arctic Railway & Navigation Co. et al. Stipulation to omit certain parts of the record in printing. Filed August 8th, 1912.

(Indorsement on cover:) File No. 23,272. Alaska, D. C., Division No. 1. Term No. 697. The United States of America, plaintiff in error, vs. Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company et al. Filed July 3d, 1912. File No. 23,272.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

UNITED STATES OF AMERICA, PLAINTIFF in error,

v.

PACIFIC AND ARCTIC RAILWAY AND Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; A. L. Berdoe, C. E. Wynn Johnson, E. E. Billinghurst, W. H. Nansen, Ira Bronson, J. C. Ford, Charles E. Peabody, W. B. King, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher. } No. 697.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE FIRST JUDICIAL DIVISION OF THE TERRITORY OF ALASKA.

MOTION BY THE UNITED STATES TO ADVANCE.

On behalf of the United States, the Solicitor General respectfully moves the court to advance the above-entitled cause for early hearing.

This is a writ of error by the United States from a final judgment of the District Court for the First Judicial Division of the District of Alaska, sustaining demurrers to and quashing an indictment, such judgment being based upon the construction of the statutes upon which the indictment is founded.

The indictment is in six counts. Counts one and two charge violations of sections 2 and 3 of the Sherman Act, 26 Stat. 209. Counts three and four charge unlawful discriminations in violation of the Interstate Commerce Act, as amended June 29, 1906, 34 Stat. 584. Count five charges a violation of section 1 of that act, in refusing to establish through routes and through rates. Count six charges the defendants with conspiring to commit, in violation of section 5540 of the Revised Statutes, the offenses against the United States set forth in the first five counts.

The court sustained the demurrers of all the defendants to the first five counts and those of the individual defendants to the sixth count.

It appears from the indictment that the Pacific and Arctic Railway and Navigation Company controls the several railway and steamboat lines constituting the so-called White Pass and Yukon route, which is the only route of travel between Skagway and Dawson; the North Pacific Wharves and Trading Company owns all the wharves at Skagway, one of which is the terminus of the White Pass and Yukon route; the Pacific Coast Steamship Company, the Alaska Steamship Company, and the

Canadian Pacific Railroad Company maintain steamship lines between Skagway and the southern ports of the United States and British Columbia, and with each of these the White Pass and Yukon Route has made joint rates and maintains a joint route. The individual defendants are officers of one or another of the foregoing corporation defendants.

It is averred in all the counts that the Pacific and Arctic Railway and Navigation Company refused to make joint traffic arrangements with the Humboldt Steamship Company, the only independent line between the said southern ports and Skagway, and established greater rates for the short haul from Skagway to Dawson and intermediate points than the through rates from the southern ports to such points, and that the Wharf Company charged double wharfage on all freight shipped on the Humboldt line.

On these facts it is charged in count one that the defendants conspired to monopolize and to destroy all competition in transportation of passengers and freight between the southern ports and Skagway; in count two that the defendants did monopolize such trade; in counts three and four that the defendants unlawfully discriminated against the Humboldt Steamship Company; and in count five that the defendants refused to establish a through route with the Humboldt Company.

Upon consideration of the demurrers the court held that the substantial charge in the indictment was a discrimination in violation of the interstate commerce law, and that an indictment would not lie

until an investigation had first been made by the Interstate Commerce Commission.

There are two vital questions involved:

1. Whether an investigation by the Interstate Commerce Commission is a condition precedent to an indictment of a carrier for unlawful discriminations.

2. When carriers combine to monopolize and restrain trade and commerce, if the acts done by them to effect such combination constitute unlawful discriminations under the interstate commerce law is such investigation by the Commerce Commission a condition precedent to a prosecution for such violation of the Sherman law?

These questions are new, and are of great importance in the enforcement of the statutes involved.

It is submitted, therefore, that, as provided by the Criminal Appeals Act, this case should be advanced for hearing at an early day.

WM. MARSHALL BULLITT,
Solicitor General.

DECEMBER 12, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 697.

THE UNITED STATES OF AMERICA,

Plaintiff in error,

v.

PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railroad Company et al., *Defendants in error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

BRIEF FOR THE UNITED STATES.

This case involves the question whether or not the United States may indict persons for violations of the Sherman Antitrust Law and of the Interstate Commerce Act, where the alleged unlawful acts relate to matters of railway transportation, rates, routing, etc., before the Interstate Commerce Commission has passed upon the matter.

Or, stated in another form:

1. When carriers combine to monopolize and restrain trade and commerce, if the acts done by them

to effect such combination also constitute unlawful discriminations under the Interstate Commerce Law, is a decision by the Interstate Commerce Commission, a condition precedent to a prosecution for such violation of the Sherman law?

2. Is a decision by the Interstate Commerce Commission a condition precedent to an indictment of a carrier for unlawful discriminations?

These questions are new, and are of great importance in the enforcement of the statutes involved.

It would be a remarkable situation if the power of the United States to indict were limited by the necessity of first having to get the Interstate Commerce Commission to decide that the alleged acts were unlawful; because if the Interstate Commerce Commission decided that the acts were proper the United States would be prevented from testing the question in the criminal courts, thereby practically giving the Commerce Commission exclusive and final criminal jurisdiction in all such matters.

Obviously, if there is any necessity to have the Commerce Commission to pass on the alleged acts, it can only be because its decision must establish the matter one way or the other; and if it decides the acts are proper, then the United States can not indict, for it would be an idle thing to require a finding as a condition precedent to indictment if it could then indict in defiance of such adverse finding.

Nature of the controversy.

The United States indicted five corporations and thirteen individual defendants, in six counts, for (1) violating the Sherman Antitrust Act (counts 1 and 2), (2) violating the Interstate Commerce Act (counts 3, 4, and 5), and (3) conspiring to violate the Sherman Antitrust Act (count 6).[1]

Substantially the same facts (with the necessary formal variations of language) were alleged in each of the first five counts.

The lower court held that as the facts on which the indictment was based related to the question of refusing to make through routes and joint rates with the Humboldt Steamship Co., or any other independent steamship line, and charging certain excessive wharfage tolls, no indictment would lie until the Interstate Commerce Commission had first decided that such refusal and wharfage charges were improper. It is not necessary, therefore, to determine rigorously whether or not the indictment does in fact sufficiently charge a violation of the Sherman Law and the Interstate Commerce Act, for the lower court assumed that the indictment was sufficient, but held that in view of the Interstate Commerce Act there could be no indictment until after the Commission had first determined the illegality of the alleged acts.

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[1] The court below dismissed counts 1 to 5, and sustained the sixth count as against the corporate defendants, but dismissed it as to the *individual* defendants. In order to simplify the discussion the Government will not deal with the sixth count at all.

The decision below practically invests the Interstate Commerce Commission with final and exclusive judicial criminal jurisdiction.

It is that construction (*a*) of the Interstate Commerce Act and (*b*) of it as related to the Sherman Antitrust Act which the United States now seeks to review.

STATEMENT OF THE CASE.[1]

The indictment alleged the following facts:

1. *Transportation route between the United States and Alaska.*—The method of transporting freight and passengers between ports in the United States (called southern ports) and places in northern Alaska and Canada (called northern ports) was (*a*) by steamship lines from the United States (southern ports) to Skagway, Alaska, (*b*) thence across a wharf at Skagway, the entire wharfage facilities there being owned by one defendant, (*c*) thence by railroad to the head-

[1] It is not necessary to go into the details of the different counts nor the slight differences in the allegations. The lower court (R. 43) has construed the indictment and held that "the facts charged in each of the first five counts are substantially that the defendants discriminated against other common carriers by inducing the defendant railroad company to refuse to enter into through routing arrangements with other carriers than the defendant steamship companies and by inducing the railroad company to charge higher rates for freight carried to Skagway on the *Humboldt* or by any other carrier not owned by one of the defendant steamship companies, and further that freight carried on vessels of other companies was charged a higher wharfage rate by the defendant wharf company."

waters of the Yukon River, and (*d*) thence by boat down the Yukon River to Dawson, etc. (called the northern ports).

2. *Control of the transportation facilities.*—Several defendants (hereafter called the Steamship Companies) operated certain steamship lines between the United States and Skagway, Alaska. Another defendant (called the Wharf Co.) owned all the wharfage facilities at Skagway. Several defendants (hereafter called the Railroad Company) owned the only line of railway transportation between the wharf at Skagway and the headwaters of the Yukon River; there was no other railroad, so it had a monopoly of the transportation between those points.

3. *Through routes and joint rates.*—By mutual agreement between the Steamship Companies, the Wharf Co., and the Railroad Co., through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the southern ports in the United States and the northern ports in northern Alaska; the route between the United States and Skagway being over either of the several steamship lines owned by the Steamship Companies, while the route for the balance of the distance was confined to the single wharf and one railroad. The joint through rate was apportioned between the defendants by agreement.

4. *Refusal to make a through route or joint rate with any independent steamship company.*—There were one or more independent lines of steamships (especially

the Humboldt Steamship Co.) plying between the United States (southern ports) and Skagway.

By agreement between the defendants, the railroad company refused to make any through route or joint rate with any of the independent steamship lines, and especially refused to make such joint through traffic arrangement with the Humboldt Steamship Co. The railroad refused to bill freight or passengers from the Yukon River to the United States, except by ships belonging to one of the defendant steamship companies; and it refused to receive any shipments from the United States on through billing except such as arrived at Skagway on ships belonging to one of the defendant steamship companies.

5. *Rates established and their effect on competition.*—By agreement between the defendants, the railroad fixed so-called local rates for transportation charges between Skagway and the Yukon River, which rates were very much higher than the railroad's *pro rata* of the through rate.

Similarly, the Wharf Co. charged wharfage at the rate of $2 a ton for all freight handled on its wharf, except when the freight was shipped on a vessel belonging to one of the defendant steamship companies and was consigned to some one who had entered, or was about to enter, into a contract to have all his shipments carried by the defendant steamship companies, in which event the wharfage charge was only

$1 per ton. All wharfage charges in excess of $1 per ton are unreasonably high.[1]

As a result of such agreement between the defendants, shippers were compelled to use only the ships of the defendant Steamship Companies, as only in that way could the lower through rates be obtained; competition in water transportation between the defendant Steamship Companies and independent lines was destroyed; the defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Steamship Company was discriminated against in the matter of through rates.

The indictment.

Upon the basis of those facts, the indictment charged as follows:

Count 1. A combination in restraint of trade.

Count 2. A monopoly of interstate trade.

Counts 3 and 4. An unjust discrimination against the Humboldt Steamship Co. and advantage to the defendant steamship companies.[2]

Count 5. A refusal to establish joint through routes and rates with the Humboldt Steamship Co.

Count 6. A conspiracy under Rev. Stat., 5440, to suppress competition, in violation of the Sherman Antitrust Act.

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[1] The lower court seems to have construed the indictment to mean that the $1 per ton wharfage charge was the Wharf Company's *pro rata* of the joint through rate; and such was probably the meaning of the pleader, although the language is not perfectly clear. (Cf. Rec. 5, 10, 14, 18, 43, 50.)

[2] Counts 3 and 4 are the same except as to the period of time covered. They may be treated as one count.

The case thus boils down to three charges, to wit:

1. That the defendants violated the Sherman Antitrust Act by establishing through routes and joint rates with certain steamship companies, while refusing to do so with the Humboldt Steamship Co., and making local rates on the wharf and railroad higher than the *pro rata* part of the through rate.

2. That the defendants violated the Interstate Commerce Act by unjustly discriminating against the Humboldt Steamship Co. and giving an advantage to other steamship companies in the matter of through routes, joint rates, local rates, etc.

3. That the defendants violated the Interstate Commerce Act by refusing to establish a through route and joint rate with the Humboldt Steamship Co.

The decision of the lower court.

It is not necessary to consider whether the indictment is in all respects good, and whether the acts charged violate the Sherman Antitrust Act or the Interstate Commerce Act, because the lower court seems to have assumed for the purposes of this case that the indictment sufficiently alleged facts which would constitute a violation of both acts (R. 43; that statement of what the indictment charged is conclusive here, *U. S.* v. *Patten*, 226 U. S., 525; *U. S.* v. *Winslow*, 227 U. S., ——, decided February 3, 1913); but held that it had no jurisdiction even to pass on the questions involved, either in a civil or criminal action, until the Interstate Commerce Commission

had first determined the questions (Rec. 43, 50, 54, 55, 56).

The lower court said:

> It becomes necessary therefore for the court to determine whether or not the court has jurisdiction in the first instance to pass upon the questions involved, either in a civil or a criminal action, or whether or not such questions must be first determined by the Interstate Commerce Commission.
>
> The facts charged in each of the first five counts are substantially that the defendants discriminated against other common carriers by inducing the defendant railroad company to refuse to enter into through routing arrangements with other carriers than the defendant steamship companies and by inducing the railroad company to charge higher rates for freight carried to Skagway on the Humboldt or by any other carrier not owned by one of the defendant steamship companies, and further that freight carried on vessels of other companies was charged a higher wharfage rate by the defendant wharf company. * * *
>
> Whether the difference in the rates charged between the freight shipped under through routing arrangements and that shipped under any other arrangement is unduly discriminatory certainly must be a question to be determined and passed upon by the Interstate Commerce Commission, providing the wharf company can be considered an instrumentality of the railroad and subject to the interstate commerce act; and it is the judgment of the

court, according to the facts charged in the indictment, that the wharf is such instrumentality and subject to the act. * * *

It seems obvious that the question of unreasonable wharfage rates and the question of discriminatory wharfage rates must be determined by the commission before the court acquires jurisdiction, either in criminal or civil proceedings, to entertain controversies involving the consideration of such questions except in cases where the discrimination is practiced under substantially the same conditions and circumstances, wherein there would be no justification or reason for two juries differing in opinion as to the legality of the discrimination charged, such as instances where the jury would be required to pass upon the question as to whether the carrier had charged a shipper more than its published rates. * * *

Under the interstate commerce act, as amended in 1910, the Interstate Commerce Commission has the power and it becomes its duty to establish through routes and through routing privileges, but only after a hearing. * * *

It follows, therefore, that if the question of through routing were submitted to a court or jury, in either a civil or a criminal proceeding, different courts and different jurors might entertain divergent opinions with respect to the same state of facts, and the jury might find a defendant guilty for refusing to through route under such circumstances and conditions as would cause the Interstate Commerce Com-

mission to refuse to grant such privileges to a petitioning carrier. * * *

It follows that the court is without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment, in either a criminal or a civil proceeding, until such matters have been submitted to and passed upon by the Interstate Commerce Commission. The demurrers to the first five counts of the indictment must therefore be sustained.

ASSIGNMENT OF ERRORS.

The twelve errors assigned are really reducible to three propositions (R. 71, 72):

I. The court erred in holding that where persons enter into a combination to restrain and monopolize trade and commerce, if the acts to be done by them in effecting such combination constitute a violation of the interstate commerce laws, such persons can not be indicted for violating the Sherman Antitrust Law, until after an investigation and determination by the Interstate Commerce Commission.

II. The court erred in holding that an indictment will not lie on the facts set forth in counts three and four of the indictment charging unjust discrimination in the transportation of passengers and freight and excessive wharfage rates until the facts have been presented to and passed upon by the Interstate Commerce Commission.

III. The court erred in holding that it is no crime as charged in count five of the indictment to refuse

to establish through routes and make through rates until an order to that effect has been made by the Interstate Commerce Commission.

ARGUMENT.

FIRST POINT.

The United States may indict for violations of the Sherman Antitrust Act without the necessity of any prior action by the Interstate Commerce Commission on the facts involved.

The Sherman Antitrust Act and the Interstate Commerce Act have different purposes, seek to remedy different evils, are wholly independent of each other, and have no relation the one to the other.

A given state of facts can constitute a violation of the Antitrust Act without violating the Interstate Commerce Act, and *vice versa*. For example, railroads might *by agreement* fix rates for interstate traffic and agree to abide by them for a given length of time. If the rates so fixed were in and of themselves, fair and reasonable, there would be no violation of the Interstate Commerce Act; but such action would clearly be in violation of the Antitrust Act (*U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S. 505); for in both the *Trans-Missouri* and the *Joint Traffic Ass'n* cases that was the precise point involved. In the latter case the rates agreed on were those filed with the Interstate Commerce Commission, and were "admitted to be *reasonable*" (171 U. S. 565). And yet it was held that the agreement was in violation of the

Sherman law; and of course the parties might have been proceeded against by indictment if the Government had chosen to do so.

In *Railroad Commission of Texas* v. *Atchison, Topeka and Santa Fe Ry. Co. et al.* (20 I. C. C. 463, 465) it was held that even if the railroads by agreement advanced rates, no presumption whatever was created that they were unreasonable, that the Interstate Commerce Commission had no powers in the enforcement of the Antitrust Act, and yet such agreement was clearly in violation of the Sherman Law.

In *Meeker* v. *Lehigh Valley R. R. Co.*, 183 F. R. 548, a coal dealer brought suit for treble damages under the Sherman Antitrust Act against a railroad company on account of the same anthracite coal combination which was subsequently dissolved in *U. S.* v. *Reading Co.*, 226 U. S. 324. The basis of the suit was the agreement between the railroads resulting in such high transportation rates that the independent dealer could not profitably do business in New York City. The Circuit Court of Appeals said (p. 550):

> These averments clearly state a violation of the Federal antitrust statute. A conspiracy to monopolize interstate commerce, as well as a conspiracy in restraint of such commerce, is charged. But it does not necessarily follow that every violation of the statute gives rise to a cause of action under its seventh section. The plaintiff must show that he has sustained damage by the violation. And here the defendant contends that the only damages which the plaintiff claims are those arising from unreasonable transportation charges, and that

the Interstate Commerce Commission is the tribunal to which resort must be had in the first instance to determine the reasonableness of such charges.

It is well settled that a shipper seeking reparation based upon the unreasonableness of a freight rate must, primarily, seek redress through the Interstate Commerce Commission. *Texas, etc., R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. See also *Baltimore, etc., R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, and the opinion of this court in *Wickwire Steel Co.* v. *New York Central, etc., R. Co.* (decided in June, 1910), 181 Fed. 316.

The difficulty lies in the application of this rule here. The plaintiff is not seeking redress as a shipper. It is not alleged that the defendant carried any coal for him, or that he offered any for shipment. The defendant is not sued as a carrier, but as a party to an unlawful conspiracy. The unreasonableness of the railroad rate was only one of the means employed to make the conspiracy effective. The increase of the price at the mines was as essential to that result as the increase in the transportation charge. That the interstate commerce act (act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. Stat. 1901, p. 3154]) creates a tribunal to which shippers must resort, primarily, for relief against excessive freight charges is no reason why a person injured by an unlawful conspiracy can not invoke the relief expressly granted by another and later Federal statute. It might as well be claimed that the United States can not

> proceed against a combination of railroad companies to fix rates until the reasonableness of such rates has been passed upon by the Interstate Commerce Commission. Yet combinations of that nature were enjoined in the *Trans-Missouri Freight Association Case*, 166 U. S. 290, and in the *Joint Traffic Association Case*, 171 U. S. 505.
>
> It is true that the courts in determining as one of the elements of a conspiracy case the reasonableness of freight rates might pass upon the same question which would be presented to the Interstate Commerce Commission by a shipper proceeding under the act to regulate commerce. But the possibility of want of uniformity in decisions constitutes no ground for denying to an injured person a right of action granted by a statute of the United States separate and distinct from that act, however weighty such consideration might be in determining whether the common-law rights of a shipper and the right to demand damages given by the interstate-commerce act itself are subjected to its other provisions. Obviously the same possibility would exist in case of proceedings by the Government to enjoin unlawful railroad combinations.

If, then, a combination relative to the fixing of rates, etc. (a subject peculiarly within the province of the Interstate Commerce Commission), may be proceeded against by the Government (*Trans-Missouri* and *Joint Traffic* cases) or by an individual (*Meeker* v. *Lehigh Valley R. R. Co.*) as in violation of the Sherman law, without regard to the action of the

Interstate Commerce Commission, it must surely follow that the United States can *indict* persons for a violation of the Sherman law without regard to any prior action by the Commission.

In the *Trans-Missouri* and *Joint Traffic* cases, it is true, the mere fixing of rates by agreement between competitors was held to be an offense against the Sherman law, regardless of the reasonableness of the rates so fixed; whereas it may be argued that in the present case the unreasonableness and discriminatory character of the rates agreed on was an essential element of the alleged conspiracy. It does not at all follow, however, that the Commission has any more jurisdiction in the one instance than in the other. On the contrary, since the Commission has no powers whatever under the Sherman Act, its finding that a particular rate was unreasonable or discrimatory would be neither conclusive nor even *prima facie* evidence in a criminal proceeding for violation of that act. Therefore, even if the reasonableness of a certain rate must be determined "as one of the elements of a conspiracy" to restrain trade or commerce (*Meeker* v. *Lehigh Valley R. R. Co.*, *supra*), that question, like any other question of fact, can only be passed on by the jury which tries the cause under the Sherman law.

It is too clear for extended argument that there may be a violation of the Sherman law by common carriers whose illegal acts are not in violation of the Interstate Commerce Act. The moment that concession is made, it follows necessarily that any finding

by the Interstate Commerce Commission is wholly immaterial because—

(*a*) If it finds the acts in question are proper under the Interstate Commerce Act, that does not shed the slightest light on whether or not they are in violation of the Sherman law.

(*b*) If it finds the acts are in violation of the Interstate Commerce Act, that does not prove in the least degree whether they are in violation of the Sherman law.

If, then, such a finding is immaterial, it can not be a condition precedent to an indictment under the Sherman law. It would be absurd to require a useless thing to be done.

It must always be borne in mind that we are not considering for an instant whether a refusal to make through routes or joint rates, charging alleged excessive rates, etc., is or is not a violation of the Sherman law. That is not here for review on this writ of error. We are only considering whether, under the *Interstate Commerce Act*, it is essential to have a finding by the Commission on the subject of through routes, joint rates, etc., before the Government can indict for a violation of the Sherman law. The lower court held that under the Interstate Commerce Act the court could not even consider whether the act alleged constituted a violation of the Sherman law; and the United States seeks to review that construction of the Interstate Commerce Act. It is quite possible that the present indictment does not state a crime under the

Sherman law. Let us concede it. Still this court has nothing to do with that question at the present time. It has only to say whether the lower court was right or wrong in holding that the Interstate Commerce Commission must first determine whether the defendants' acts were in violation of the Interstate Commerce Act, before the court can consider whether the defendants' acts were in violation of the Sherman law.

At the risk of repetition, we direct attention to how perfectly futile any determination of the Interstate Commerce Commission would be, even if made. For if it decided the defendants' acts *were* in violation of the Commerce Act, that would not prove nor even tend to prove that they were in restraint of trade under the Sherman law; while, on the other hand, if it decided that they were *not* in violation of the Commerce Act, that would not shed any light on their validity under the Sherman law.

Or, looked at from a different angle, if there were any necessity for a precedent finding by the Interstate Commerce Commission, it must be because when made it would establish some fact under the Sherman law. But it is given no powers under the Sherman law; and any finding when made could be disputed by either party as not binding in a proceeding under the Sherman law.

A moment's reflection must demonstrate that prosecutions under the Sherman law must stand on their own bottoms; and that the power of the United States to indict thereunder can not, in reason, be

limited by the necessity of first obtaining the consent, or approval, as it were, of the Interstate Commerce Commission.

In so far, therefore, as the lower court sustained demurrers to counts 1 and 2 under the Sherman law, because the Interstate Commerce Commission had not determined the question of through rates, etc., the judgment below should be reversed and the cause remanded for a determination of whether counts 1 and 2 do sufficiently allege facts constituting an offense under the Sherman Antitrust Act.

SECOND POINT.

The United States may indict for unjust discriminations, etc., in violation of the Interstate Commerce Act without the necessity of first having the Interstate Commerce Commission to determine the legality or propriety of the acts complained of.

This branch of the case (relating to counts 3, 4, and 5) presents difficulties which are pointed out in the opinion of the court below (R. 48–58).

Briefly stated, the question is, Whether, in view of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, the propriety of any arrangement or nonarrangement as to rates, routing, or practices between common carriers can be the subject of judicial review in a criminal case until after the Interstate Commerce Commission has first determined such propriety? The argument of the defendants is that those

matters are under the jurisdiction of the Commission, and it might find one way and one court or jury might find the opposite way, while still another court or jury might agree with the Commission—resulting in the very divergence from equality of treatment which it was the purpose of the act to secure.

The lower court held that it was "without jurisdiction to entertain or determine the questions involved" "until such matters have been submitted to and passed upon by the Interstate Commerce Commission" (R. 56). But if that be the correct view, what would be left for a court to do *after* the Commission *had* passed on the questions?

Would the court be concluded by the Commission's determination? If not concluded, why have the Commission act at all?

(*a*) If the Commission decided that the alleged acts were proper and *not* in violation of the statute, would the Government be *ipso facto* debarred from finding an indictment? Or, if indicted, could the defendants plead the Commission's ruling in bar? And if the defendants then continued the practice under the supposed protection of such ruling, would they be safe as against a prosecution the next year when, perhaps, the views of the Commission might have changed, as they did in the grain elevator cases?

(*b*) Or, again, if the Commission decided the alleged acts *were* in violation of the Interstate Commerce Act, would that be conclusive against the defendants in a criminal proceeding? And if not conclusive, then why is it necessary at all? Why should it be a con-

dition precedent, if, when made, it can have no effect on the court? But, if binding on a trial under an indictment, it would be violative of the Sixth amendment in that the defendants would not be confronted with the witnesses against them.

The true solution of the whole question would seem to be found in the fact that while as between the *shippers* and the *carriers* the Interstate Commerce Commission is given certain jurisdiction to determine controversies and its action is necessary before any resort to the courts can be had, yet that as between the *Government* and the carriers or the *Government* and the shippers, whether in a civil or criminal proceeding, the courts have, and must have, unimpaired jurisdiction to settle the questions without regard to the action of the Commission. That view would reconcile the *Abilene Cotton Oil* case, *Pitcairn Coal Co.* case, and *Robinson* v. *B. & O. R. R. Co.* with the other cases hereafter to be cited (p. 29 *et seq.*, *infra*). As a practical matter, it is hardly likely that the Government would indict for a practice or act which the Commission had once decided was proper, but the Government must have the power to do so, or else it would be surrendering to the Commission (a non-judicial body) exclusive criminal judicial jurisdiction.

In so far as the argument *ab inconvenienti* is concerned that the Commission and the Government might look differently on the same facts, that is simply one of the situations that may arise in any complex social system.

As between carriers and shippers, it is necessary that one body should have primary exclusive jurisdiction so as to prevent divergence of views, and thus not to defeat the equality of treatment which it was the purpose of the act to secure.

But as between the Government (proceeding on behalf of all the people) and shippers or carriers, the courts must settle the questions there arising, independently of the Commerce Commission.

1. We may, for the purposes of argument, concede that a shipper or rival carrier can not by private suit seek to redress alleged wrongs as to excessive wharf charges or the refusal to make through routes, joint rates, etc., until after the Interstate Commerce Commission has first heard and determined the matter.

2. We are not here concerned with the question whether or not counts 3, 4, and 5 of the indictment do in fact state offenses under the Interstate Commerce Act. Possibly they do not. Let us concede they do not. The lower court declined even to consider whether they did or not; therefore that question is not here.

The only question presented here is the lower court's construction of the Interstate Commerce Act to the effect that the Government could not indict for its violation until after the Commission had first passed on the very question at issue. It is that construction which the United States seeks to review under the Criminal Appeals Act.

3. The lower court failed to analyze the essential difference between (1) proceedings by *shippers* and (2) proceedings by the *United States*. The court assumed that the same limitations which exist against shippers seeking relief in the courts without first applying to the Commerce Commission would also apply to the United States. But such is not the case.

FIRST. *In the light of reason.*—The whole object of the Interstate Commerce Act was to create an administrative body "to prevent discrimination between persons and places" (*I. C. C.* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 102); and, as fully pointed out in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, the object of the act, as amended, was to impose upon carriers certain regulations and duties in the interest of the public and of the shippers, and thereby give new rights to shippers, which required a single administrative body with *quasi* judicial attributes properly to enforce the act. The Commission was given certain broad powers to compel obedience to the law as between the carriers and the shippers, but there its power stops.

Any finding of the Commission must be made either on its own initiative or upon complaint of an injured party; but clearly such a finding can not have any effect upon the power of the United States to indict for what it deems a violation of the act; for, if so, we would have the astounding situation of the Commission in a purely private controversy settling questions of criminal law.

Let us see what the result would be:

(*a*) If the finding of the Commission when made would not be of *prima facie* or conclusive effect to establish any fact on a subsequent indictment by the United States, then surely it would be a senseless thing to require such a finding as a condition precedent to the right of the United States to indict. For why require a thing, which when done, will have no effect to establish anything?

(*b*) If, on the other hand, the finding of the Commission when made is conclusive upon a subsequent indictment, is it binding both on the United States and on the defendants? Is it binding only on persons who were before the Commission? Is it binding on the world, even as against persons who were not heard?

(*c*) Is such finding of the Commission conclusive both when it says the acts complained of *are* in violation of the act and when it says they are *not* in such violation?

(*d*) If a finding that the acts complained of were *not* in violation of the act is binding on the United States so as to be a bar to an indictment, then the Commission has become the judicial tribunal of last resort in criminal matters. And if the finding, when in favor of the acts, is binding on the United States, surely if the finding is *against* the acts, it ought to be equally binding against the *defendants*. But some of the defendants to the indictment might not have been before the Commission. What as to them? What

becomes of the Sixth Amendment, if a defendant in an indictment is concluded by a finding of a Commission?

(*e*) If the finding is that the acts complained of were unlawful under the act, then, on an indictment, is such finding open to attack? If open to attack by the defendants, why require it as a condition precedent to the finding of the indictment? If not open to attack, the defendants are necessarily guilty, and the Commission is again a final judicial tribunal.

Examples might be multiplied to show the inextricable confusion that would arise if on an indictment by the United States for a violation of the Commerce Act the findings by the Commission must be given any conclusive or even *prima facie* effect. It would be impossible to formulate principles by which on a trial under an indictment the findings of the Commission could be given effect. The only alternative would be to hold that when the Commission, either on its own initiative or upon complaint of an injured party, finds a fact, such fact must be taken as true for all purposes and at all times—binding both (1) upon the United States (whether represented at the hearing or not), (2) upon the parties to the hearing, and (3) upon third parties, defendants, not at the hearing. Where would that leave the subject of indicting persons for violations of the act? Would it not almost make the trial a formality, requiring a verdict of guilty or not guilty, according as the Commission had found the fact to be? The Commission would, as said above, thus become practically the court of final criminal jurisdiction.

We submit that, in the light of reason, the sufficiency of an indictment on demurrer is not dependent upon any precedent finding of the Commission, but that the court must determine whether it states an offense under the act.

Whether or not upon the trial it is permissible for a defendant to introduce the finding of the Commission as evidence is a question not here involved.

All we say is that the lower court erred in refusing even to consider whether the indictment stated an offense under the act. If it had decided that no offense was stated under the act, well and good. But it did not do so. It refused even to pass on that question at all.

SECOND. *The provisions of the statute.*—This distinction between private suits and criminal proceedings which we have pointed out is reinforced by a comparison of the civil remedies provided by the act and its penal provisions.

Section 13 imposes on the Commission the express duty of investigating the complaint of any person who has a grievance against the carrier; while section 16 declares that the Commission upon determining that such complainant is entitled to damages, shall make an order to that effect, which order shall be *prima facie* evidence of the facts therein stated. It can not be questioned that these provisions give the shipper a clear remedy for his wrongs through the action of the Commission which that body is required to enforce.

On the other hand, the only analogous penal provision is that making it the duty of United States attorneys to prosecute violations of the act upon the request of the Commission (sec. 12); and there is nothing in the act, save perhaps the general requirement that the Commission shall "execute and enforce" its provisions (sec. 12), which imposes on the Commission any duty to make such request. If, then, the making of this request is entirely within the Commission's discretion, and is also a condition precedent to any criminal prosecution under the act, the criminal enforcement of the act is obviously a matter of grace resting wholly with the Commission and not a matter of right. Such a result is scarcely conceivable, yet it flows of necessity from the proposition maintained by the court below.

Further, there is nothing in the act which makes the Commission's findings *prima facie* evidence or evidence of any kind in criminal proceedings.

THIRD. *Under the authorities.*—They may be divided into two classes, to wit: (1) Suits between private parties, *i. e.*, shippers and carriers; (2) suits between the United States and shippers or carriers. They are governed by wholly different rules as to the necessity for prior action by the Interstate Commerce Commission.

Class 1.—It has been repeatedly held that a suit by a *shipper* would not lie against a *carrier*, in advance of a hearing and determination by the Interstate Commerce Commission, either (1) to recover damages for alleged unreasonable rates after a

schedule has been filed (*Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506; see *Procter & Gamble* v. *United States*, 225 U. S. 282, 296); (2) to enjoin the filing, publication, or enforcement by a carrier of a new proposed rate as unreasonable (*Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 171 F. R. 713; affirmed, 178 F. R. 261; *Houston Coal Co.* v. *Norfolk & W. Ry. Co.*, 171 F. R. 723; affirmed, 178 F. R. 266; *Atlantic Coast Line* v. *Macon Grocery Co.*, 166 F. R. 206; affirmed on other grounds, 215 U. S., 501; *Wickwire Steel Co.* v. *N. Y. C. & H. R. R. Co.*, 181 F. R. 316),[1] or (3) to prevent an

[1] It should be observed that even in suits between shippers and carriers the courts have sometimes assumed jurisdiction even before action by the Commission. For example, in *Northern Pacific Ry. Co.* v. *Pacific Coast, etc., Assn.*, 165 F. R. 1, and *Union Pacific R. Co.* v. *Oregon & Wash., etc., Assn.*, 165 F. R. 13, new rates had been filed and an injunction was granted against their enforcement until the Commission should decide on their reasonableness; *Jewett Bros.* v. *C. M. & St. P. Ry. Co.*, 156 F. R. 160, sustained the right of a court to enjoin proposed rates without regard to the Commission's prior action thereon; and in *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 158 F. R. 193, an injunction was granted to restrain the enforcement of a proposed increase of rates until the Commission should be able to pass on the question.

The Supreme Court has not settled the conflict raised by the cases cited in this footnote with the cases cited in the text above. It is to be noticed that (with the exception of the *Jewett Bros.* case) they went no further than to hold that a circuit court could temporarily enjoin the increase pending action by the Commission; and the *Jewett Bros.* case is weakened by the fact that while asserting the power to enjoin the rates it was not in fact exercised.

alleged discrimination in furnishing cars (*B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481), or to recover damages on account of discriminatory charges (*Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506).

But they were all cases between shippers and carriers and in no sense involved the question of a controversy between the Government and the carrier or shipper.

Class 2.—As far as we can recall, there has never been a case between the United States and a carrier or a shipper where it has been held or even suggested that prior action by the Commission was necessary to the maintenance of the proceeding. But, on the contrary, the United States has repeatedly indicted and convicted both railroads and shippers under the Interstate Commerce Act and the Elkins Act for giving and receiving rebates, unjust discrimination, etc., without the least intimation that its right to so proceed was in any way dependent on the Commission's prior action or determination of the matters involved.

A review of the cases will be instructive.

Supreme Court cases.

In *Wight* v. *United States*, 167 U. S. 512, an indictment and conviction were sustained against a railroad official for an unjust discrimination in that he made an allowance to a shipper for hauling the freight from the depot to the shipper's warehouse, which allowance was made in order that the railroad could compete with a rival road that had a siding

from its depot to the warehouse. There was no intimation that prior action by the Commission as to whether or not that practice was a discrimination was necessary before the United States could indict.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, and *C. B. & Q. Ry. Co.* v. *United States*, id. 90, convictions were sustained for both receiving and granting rebates, although the contract for the lower rate was at the then established tariff, but the rate was later increased, and the railroad merely performed its antecedent contract according to its terms. The Commission never passed on the matter.

In *Chicago & Alton Ry. Co.* v. *United States*, 156 F. R. 558 (affirmed by a divided court, 212 U. S. 563), convictions for rebating were sustained where the arrangement in question was that of the railroad making an allowance to the shipper for the use of the shipper's extensive private tracks from his packing house to the railroad. There, again, the Commission had not first heard or determined whether the arrangement was or was not permissible under the act.

So in *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452; *N. Y. Central* v. *United States*, 212 U. S. 481, 500 (2 cases); and *United States* v. *Miller*, 223 U. S. 599, indictments were sustained for granting and receiving rebates where there was no prior action by the Commission.

Inferior Federal court cases.

In *United States* v. *Vacuum Oil Co.*, 153 F. R. 598, there was an indictment against a shipper for knowingly receiving an unjust discrimination, in that a low

rate was received by the defendant between two points, while vastly higher rates were charged all other shippers from slightly different points where the conditions of shipment were substantially the same (p. 605). That was essentially a case where the power of the Commission might have been invoked to decide whether an illegal discrimination existed; but it was not invoked, and the indictment was upheld.

In *United States* v. *Hocking Valley Ry. Co.*, 194 F. R. 234, and *United States* v. *Sunday Creek Co.*, 194 F. R. 252, indictments were upheld against both the carrier and the shipper for unjust discrimination; receiving a different compensation from one shipper than another, etc., where the arrangement consisted in the carrier accepting notes or extending credit to the shipper for a part of the freight charges. Again, there was no suggestion that the Commission must first determine whether such facts constituted an unjust discrimination.

In *Chicago, St. P., etc., Ry. Co.* v. *United States*, 162 F. R. 835; *Wisconsin Central* v. *United States*, 169 F. R. 76; *Lehigh Valley R. Co.* v. *United States*, 188 F. R. 879; and *Standard Oil Co.* v. *United States*, 179 F. R. 614, convictions for granting or accepting rebates were sustained, where the various devices resorted to were in one way or another claimed to be proper. In none of them had the Commission first passed on the matter.

See also *United States* v. *Great Northern R. Co.*, 157 F. R. 288; *Atchison, T. & S. F. Ry. Co.* v. *United*

States, 170 F. R. 250; *United States* v. *Phila. & Reading Ry. Co.*, 184 F. R. 543; *United States* v. *Texas & Pacific*, 185 F. R. 820; *United States* v. *Merchants' & Miners' etc. Co.*, 187 F. R. 363; and *United States* v. *B. & O. R. Co.*, 153 F. R. 997, for indictments under a variety of circumstances for violations of the Interstate Commerce Act where there was no prior action by the Commission.

It may be suggested that in the foregoing cases the crime was so plain that there was no necessity to go first to the Commission, and that there was nothing for it to decide. But if that is the rule, who is to determine when it is and when it is not necessary for the United States first to secure the finding of the Commission?

But in truth, in many of the cases above reviewed the question of criminality was far from plain as a reading of the opinions will disclose. We submit that the long-continued practice of the United States indicting for violations of the act without first obtaining the authority, as it were, of the Commission is pretty persuasive evidence that the defendants' contention is without merit.

4. We again emphasize that on this writ of error it is not necessary to consider whether (1) the refusal to grant through routes or joint rates, or (2) a charging of an excessive wharfage, or (3) a local rate disproportionate to the through rate, do in fact constitute unjust discriminations under the act; for the

lower court refused to pass on that question, saying (Rec. 56):

> It follows that the court is without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment, in either a criminal or civil proceeding, until such matters have been submitted to and passed upon by the Interstate Commerce Commission. The demurrers to the first five counts of the indictment must therefore be sustained.

And it is therefore not subject to review here.

5. In the opinion of the Government the only escape from the foregoing argument is to hold that there can be no offense under the Interstate Commerce Act as it now stands, except for a violation of an order made by the Commission. If it be the law that the prohibitions contained in the Interstate Commerce Act are no longer self-executing, but only come into play after the Commission has made an order, well and good, and it is desirable that the railroads and the shipping world should know it. But such a theory seems wholly untenable.

CONCLUSION.

The Government insists that upon an indictment for a violation of the Sherman law or of the Interstate Commerce Act, *first*, the lower court must determine whether the facts alleged constitute a violation of the act (thus leaving either party free to test the correctness of such a decision in the manner provided by

law); and, *secondly*, the lower court can not decline to decide such matters upon the ground that they must first be "submitted to and passed upon by the Interstate Commerce Commission."

The judgment should be reversed with instructions for the lower court to pass on the sufficiency of the indictment without regard to the action or non-action of the Interstate Commerce Commission.

WM. MARSHALL BULLITT,
Solicitor General.

FEBRUARY 10, 1913.

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CITATIONS.

In the
Supreme Court of the United States

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

VS.

PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY, ET AL, DEFENDANTS IN ERROR.

In Error to the District Court of the United States for Alaska, Division No. 1.

BRIEF FOR DEFENDANTS IN ERROR.

This writ of error was taken by the United States from the judgments of the court below sustaining the demurrers of the several defendants to Counts 1, 2, 3, 4 and 5 of the indictment, and also sustaining the demurrers of the individual defendants to Count 6.

The defendants, Pacific Coast Steamship Company, Alaska Steamship Company and Canadian Pacific Railway Company, operate steamships between Puget Sound and Canadian ports, to Skag-

way, Alaska. The defendant, Pacific and Arctic Railway and Navigation Company, owns and operates a line of railroad between Skagway and the international boundary, a distance of approximately twenty miles. At that point its railroad connects with another railroad owned and operated by the British Columbia Yukon Railway Company, a foreign corporation, which road extends from the international boundary to the east shore of Lake Bennett, where it connects with another railroad owned and operated by the British Yukon Railway Company, a foreign corporation. This latter road extends from the east shore of Lake Bennett to White Horse on the headwaters of the Yukon River. The British Yukon Navigation Co., a foreign corporation, operates a line of steamers on the Yukon River from White Horse to Dawson and way ports. The line from Skagway to Dawson, composed of the separate lines owned separately by the Pacific and Arctic Railway and Navigation Company and the three foreign corporations, is designated generally as the White Pass Route. The indictment alleges that the line of road from the international boundary to Lake Bennett was "owned and operated by the British Columbia Yukon Railway Company." A similar allegation is made with respect to each of the other foreign lines. The indictment further

alleges with respect to this White Pass Route, as follows:

"That said four corporations last above mentioned, and the stocks and bonds of the same, were owned and controlled by the same persons and individuals, and said three lines of railroads and said line of steamers last mentioned were under one and the same management, and operated as one continuous line of common carriers of freight and passengers in interstate commerce between said towns of Skagway and Dawson, under the name and style of White Pass & Yukon Route."

The North Pacific Wharves & Trading Company is alleged to own and operate the public wharf at the town of Skagway, which is used by all of the defendants, both for local and through freight. While the indictment charges that the Wharf Company owned and operated the wharf as a public wharf, it also further charges that the defendant, Pacific and Arctic Railway and Navigation Company, under some agreement with the Wharf Company, made the wharf a southern terminus.

The individual defendants are charged in some of the counts as having been officers and agents of the defendant corporations. In other of the

counts their relation to the corporations is not stated.

Count 1 of the indictment is based upon Section 3 of the Sherman Anti-Trust Act. Count 2 is based upon Section 2 of the same Act. Counts 3, 4 and 5 are based upon the Interstate Commerce Act.

Count 1 charges in substance that the defendants, by combination and conspiracy to restrain trade, caused the Pacific and Arctic Railway & Navigation Company to enter into agreements for through routing and through rating with the three defendant Steamship Companies, and to refuse to enter into agreements for through routing or through rating with any other steamship company. It further charges that pursuant to the same conspiracy, the Wharf Company charged One Dollar ($1.00) per ton wharfage on through routed goods, and Two Dollars ($2.00) per ton upon goods that were not shipped under through routing. Count 2, which is based upon Section 2 of the Sherman Anti-Trust Act, charges the same acts as constituting a monopoly of the carrying business between the southern ports and Skagway by the three defendant Steamship Companies.

Counts 3 and 4 of the indictment charge the same acts on the part of the defendants; that is, the entering into through routing agreements with the defendants, and the refusal to enter into such an agreement with the Humboldt Steamship Company, an alleged competing water line, and the same discrimination in wharf charges, as constituting violations of the Interstate Commerce Act.

Count 5 charges that the defendants, through the Railroad Company, refused to enter into through routing agreements with the Humboldt Steamship Company, and avers this to be a violation of the Interstate Commerce Act.

The Court below sustained the demurrers of the several defendants to the first five counts of the indictment, upon the general ground that the acts charged did not constitute such restraint of trade or monopoly under the Sherman Anti-Trust Act, nor undue discrimination or undue preference under the Interstate Commerce Act. He sustained the separate demurrers of the several individual defendants to Count 6 of the indictment, upon the ground that that count of the indictment did not specify sufficiently acts of the individual defendants which were relied upon as constituting, or aiding, or abetting or participating in the alleged offense.

The United States sued out a writ of error to review these judgments under the provisions of the Act of March 2, 1907.

A short history of the transactions leading up to the indictment will probably aid in a clear understanding of the issues.

The Humboldt Steamship Company, a corporation, operating the steamer "Humboldt" between Puget Sound ports and Skagway, Alaska, filed its petition with the Interstate Commerce Commission in 1909, praying for an order of that Commission establishing a through route to Dawson and Yukon River points, between the Pacific and Arctic Railway Company and its connecting carriers on the one side, and the Humboldt Steamship Company, operating the steamer "Humboldt," on the other. The Interstate Commerce Commission, after a hearing, denied the petition, holding that Alaska was a District and not a Territory, and that it had no jurisdiction of commerce in Alaska.

19 *I. C. C. Reports,* page 105.

Subsequently, the Humboldt Steamship Company made application to the District Court of the District of Columbia, for a writ of mandate to compel the Commission to entertain jurisdiction of its

petition. This case was finally decided by this Court in April, 1912, the Court holding that Alaska was a Territory within the meaning of the Interstate Commerce Act, and directing that the writ issue.

224 *U. S.*, page 472.

The original application of the Humboldt Steamship Company was thereupon brought on for hearing again before the Interstate Commerce Commission, and it again held that inasmuch as the through route sought to be established by the petitioner involved a carriage in foreign territory, and by foreign companies not subject to the jurisdiction of the Commission, or to the laws of this country, it was without power to establish such a through route.

20 *I. C. C. Reports,* page

ARGUMENT.

I.

The writ of error in this case having been taken under the provisions of the Act of March 2, 1907, the questions for review are those, and only those, arising from the decision of the Court below in construing the statutes upon which the indictment is founded.

(a) The demurrers of the individual defendants to Count 6 of the indictment were sustained by the Court upon the ground that the indictment did not sufficiently specify the acts of the individual defendants which were relied upon as constituting a participation by them in the offense charged, or in aiding or assisting therein. This was not in any sense a construction of either the Conspiracy Statute, upon which that count of the indictment was founded, or of the Interstate Commerce Act, the violation of which was the crime which the defendants were alleged to have conspired to commit. This ruling of the Court was based upon general principles of the criminal pleading, and is not reviewable under this writ.

United States vs. Keitel, 211 U. S. 370;
United States vs. Stevenson, 215 U. S. 190.

The same defect exists in several of the other counts in the indictment, and demurrers were interposed by the individual defendants to each of those counts upon the same ground. Inasmuch as the Court below, however, sustained the demurrers of all of the defendants to the other five counts, upon other grounds, he did not have occasion to, and did not pass upon this specific ground, to-wit, that the individuals were not sufficiently connected with the

offense charged by the allegations of the indictment in the first five counts. If the Court should reverse the case as to the first five counts, we respectfully ask that the order of reversal be in such form as will permit the Court below to pass upon such of the grounds of demurrer as were not passed upon in the former ruling.

(b) The ruling of the Court below on Counts 1 and 2 can be reviewed only in so far as that ruling was based upon the construction of the Sherman Anti-Trust Act, upon which these two counts of the indictment are founded.

It is our contention that the decision of the Court in sustaining the demurrer to these two counts is not in any proper sense based upon a construction of the Anti-Trust Act. The Court below did hold that in order to constitute restraint of trade, or monopolization of trade under the Anti-Trust Act, the acts charged must be such as at common law constituted restraint of trade, and were unlawful. To this extent, he construed the Anti-Trust Act. But the construction was clearly correct, inasmuch as the Court merely stated the construction given by this Court in the Standard Oil case. Having laid down this general construction, the Court proceeded to an inquiry as to whether

the entering into through routing agreements by a common carrier, with one or more connecting carriers, and the refusal to make such agreements with other connecting carriers, was unlawful either at common law or by the Interstate Commerce Act, and having reached the conclusion that it was not unlawful, he held that such act did not constitute restraint of trade within the meaning of the Anti-Trust Act. Without stopping at this time to discuss the correctness of the decision as to the common law, and the construction of the Interstate Commerce Act, the question is, can this Court, under this writ, review those rulings? It is our contention that the decision of the Court below, in so far as it was based upon the enunciation of the common law and the construction of the Interstate Commerce Act, is not reviewable in this case, so far as Counts 1 and 2 of the indictment are concerned. As to these counts, the review is limited to the application of the Court below of the conclusions he reached as to the common law, and the Interstate Commerce Act, to the Anti-Trust Act. The correctness of the construction of the Commerce Act and of the statement of the common law must be accepted, and this Court in this proceeding can review the judgment, only in so far as it applied those principles to the Anti-Trust Act.

II.

We are somewhat embarrassed and placed at a serious disadvantage in the preparation of this brief by the fact that the plaintiff in error has delayed the filing or serving of its brief. In our discussion of the case we can only assume that the same points will be urged in this Court that were urged on behalf of the Government in the Court below.

The indictment charges the defendant corporations with entering into a conspiracy or combination in restraint of trade and in violation of the Interstate Commerce Act, by the doing of two things, to-wit: (a) The defendant Railway Company entered into agreements for through routing and through rating with the three defendant steamship companies and refused to enter into such agreements with any other steamship company; and (b) the defendant Wharf Company charged a wharfage fee of one dollar per ton upon through routed goods and two dollars per ton upon goods that were not billed through. These are the only acts of the defendants which are charged to have been the subject of conspiracy or to have been wrongful. We insist that neither of these acts, nor the two combined, amounts to undue restraint of trade or

monopoly, under the Anti-Trust Act, or undue discrimination under the Interstate Commerce Act.

(a) The Pacific and Arctic Railway & Navigation Company was constructed and operated from the international boundary line to Skagway. It was under no legal duty to assume any obligations whatever with respect of the carriage of either freight or passengers by water between Skagway and the southern ports. If it voluntarily assumed any obligations for carriage beyond its own line, it had the legal right at its own discretion to select the agencies beyond its own line for which it would be responsible. Under the principles of common law, it had this absolute right, and could enter into an agreement for through routing and through rating with one connecting carrier and refuse to enter into any such agreement with any other connecting carrier. This principle has been clearly established by

A. T. & S. F. R. Co. vs. D. etc. Co., 110 U. S. 667;

S. P. R. Co. vs. I. C. C., 200 U. S. 536;

I. C. C. vs. N. P. Co., 216 U. S. 538.

The same rule has been announced in a number of the federal courts, some of which are cited:

St. Louis Drayage Co. vs. L. & N. R. R., 65 Fed. 39;

O. S. L. Co. vs. N. P. R. Co., 51 Fed. 465;

C. & N.-W. Co. vs. Osborne, 52 Fed. 912;

P. & S. Co. vs. A. T. & S. F. Co., 73 Fed. 438;

G. C. & S. R. Co. vs. S. S. Co., 86 Fed. 407;

Central Stock Yards Co. vs. L. & N. R. Co., 118 Fed. 113.

Under the principle of these cases the right of the Railroad Company to make or refuse to make agreements for through routing, or to make such agreements with one connecting carrier and refuse to make it with other, was an absolute and unqualified right, and in the very nature of such agreements it could not be otherwise. A through rating agreement not only extends the responsibility to the carrier beyond its own line, but involves elements of contract—an agreement as to the through rates and the division thereof; an agreement as to the terms and conditions of through routing, time and place and officers between whom settlements are to be made, suitable provisions for investigating and settling claims for loss or damage that occur in the carriage. It involves an extension of credit and has many of the elements of a partnership. Necessarily, such an arrangement must be worked out by the voluntary agreement of the parties, or it must be fixed by some tribunal having jurisdiction

over both parties and authority to enforce the terms it prescribes. This principle was not seriously controverted by the Government on the trial below, but it was insisted that the Interstate Commerce Act changed the common law and made it the absolute duty of every carrier to enter into through routing agreements with each and every connecting carrier. This contention is based upon the clause in Section 1 requiring carriers "to establish through routes and just and reasonable rates applicable thereto"; and it was contended in the Court below that a refusal to establish a through route with a connecting carrier is a criminal offense under Section 10 of that act, and amounts to undue restraint of trade under the Anti-Trust Act. Section 15 of the Interstate Commerce Act authorizes the Commission, after a hearing, either upon its own initiative or upon application of any carrier, to establish through routes and prescribe the terms and conditions thereof, and the division of the through rate. With respect to this contention of the Government, it will probably be sufficient to say that the indictment itself shows that the defendant Railway Company and the defendant Steamship Companies have established through routes and just and reasonable rates applicable thereto. The clause quoted certainly does not require a carrier to establish through routes

with all connecting carriers. So long as reasonable through routes are established, the obligation imposed by this section of the act is complied with.

It is manifest, however, that this clause in Section 1 of the statute, standing alone, is not capable of particular enforcement, and that it must be read in connection with Section 15. Two carriers cannot establish a through route unless they can agree upon the terms and conditions, and upon the amount and division of the through rate. It will scarcely be contended, we think, that the failure of carriers to come to terms of agreement can be made a criminal offense under Section 10 of the Commerce Act or under the Sherman Anti-Trust Act. In the case of *Cardiff Coal Co. vs. C. M. & St. P. R. Co.,* 13 I. C. C. Rep. 460, the Commission held that this detached clause in Section 1 must be read in connection with section 15 of the same act, and that Section 1 was to be taken simply as a statement of a general principle, the observance and enforcement of which could be compelled by the Commission under the procedure described in Section 15. This seems to be a rational construction of the clause in question. In fact, we think it is the construction which this court has given to the act in its previous decisions.

In I. C. C. vs. N. P. Co., 216 U. S., 538, the Union Pacific requested a through route with the Northern Pacific at Portland on eastern shipments destined to Puget Sound. The two lines were connecting carriers at Portland. The Northern Pacific having refused to enter into a through routing agreement as requested, the Union Pacific applied to the I. C. C. under Section 15 of the act for the establishment of such through route, and after a hearing an order was made by the Commission establishing a through route, and requiring the Northern Pacific to conform to it. Manifestly if this clause in Section 1 makes it the absolutely duty of a connecting carrier to enter into a through routing agreement with every connecting carrier, and subjects it to a criminal prosecution under Section 10 of the act, if it refuses to do so, the Northern Pacific in that case was daily violating the law and subjecting itself to the criminal penalties of the statute. The Northern Pacific brought a bill in equity to enjoin the Commission from the enforcement of this order, and this Court sutained that action and made the injunction permanent. It appeared that there were other adequate and satisfactory through routes from the East to Puget Sound; and this Court held that, under Section 15 of the act, as it then stood, the Commission was

without power to establish another through route. But, as suggested above, if the clause in Section 1 is to be construed as imposing a positive duty on each carrier to establish a through route with every connecting line, then this Court would not, at the instance of the Northern Pacific, have granted an injunction to enable it to evade or disregard such duty.

In the case at bar, the Court below held that there was no obligation or legal duty upon a carrier to make a through routing agreement with any particular connecting carrier, until the Interstate Commerce Commission, after a hearing, had in the first instance determined that such a through route was required by the public interest, and ordered its establishment. We think that the correctness of this ruling cannot be successfully questioned. A contrary construction of the statute would disregard the provisions of Section 15, and would be inconsistant with the decision of this Court in the case of *I. C. C. vs. N. P. Co., supra.* The fact that through routing involves elements of agreement, and the fact that Section 15 of the act requires the Commission, before it can establish a through route, to give the parties interested a hearing, and in connection with the through route to

prescribe the terms and conditions thereof, and to prescribe the distribution or apportionment of the through rate, are irreconcilable with any view other than that taken by the Court below. If the defendant Railway Company in this case was required to enter into a through routing and through rating arrangement with the Humboldt Steamship Company, it would necessarily assume very heavy responsibilities and obligations in connection with traffic originating on its line and carried upon the steamer of the Humboldt Steamship Co. It is a well-known fact that bullion shipments from the Yukon country during the years covered by the indictment at times ran into very large sums, and it is easily conceivable that the Railway Company at times would have six or eight hundred thousand dollars in bullion to be delivered to its connecting carrier at Skagway for transportation south. The obligations of the initial carrier, under the usual terms of bills of lading, and particularly under the Carmack amendment, make it necessary for the initial carrier to consider the financial responsibility of the connecting carrier before entering into and assuming such obligations as would result from through routing. The character of the service to be furnished by the water carrier, the frequency of its sailings, and the size,

speed, safety and accommodations of its vessels, were to be considered by the Railroad Company in determining its action. This necessarily called for the exercise of judgment and discretion. Under Section 15 of the Commerce Act, all such factors can be considered and both parties fully protected by the terms and conditions prescribed by the Commission; but in the absence of any action by the Commission, the initial carrier must of necessity determine what is best for its business.

If the defendant Railway Company was under a positive duty to make through routing agreements with each and every steamship company touching at Skagway, then every railroad company operating into New York is required to make such agreements with every steamer line touching at New York Harbor and engaged in the coastwise trade.

It will be noted that the indictment in this case does not allege that any particular agreement for through routing was ever presented to the Railway Company by any other connecting carrier than the defendants, nor does it allege upon what terms and conditions the railway should have contracted, nor indicate in any way how the defendant Railway Company was to be protected against the additional obligations resulting from a through

routing with such carrier. In fact, Counts 1 and 2 of the indictment fail to allege that there was any other carrier between the southern ports and Skagway than the three defendant steamship companies. The bald proposition as presented is that the defendant Railway Company has unduly restrained trade by making through routing agreements with three competing water carriers, and by refusing to make such agreements with any other water carrier, without any showing whatever that there were any other water carriers in existence operating on the run in question, or that any such carriers requested or were willing to enter into through routing agreements, or tendered any fair and reasonable agreement for through routing, or were of such financial responsibility as entitled them to such credit as is necessarily involved in such an agreement, or able to supply a service satisfactory to the railway company.

The Court below held that it was contemplated and intended by the Interstate Commerce Act that the question, when and under what circumstances a through route should be established between any two particular connecting carriers (in the absence of voluntary agreement between them), and upon what terms and conditions such through route should be established, was committed in the first

instance exclusively to the determination of the Interstate Commerce Commission pursuant to the provisions of Section 15 of the act; that the courts could not, in either a civil or criminal proceeding, determine in the first instance and in the absence of action by the Commission, whether a through route as between any two specified connecting carriers was or was not required by the public interest; and that in the absence of any action by the Commission, an allegation that a carrier entered into a through routing agreement with one connecting carrier and refused to make such agreement with any other carrier, cannot be held to be undue discrimination under the Commerce Act, or undue restraint of trade under the Anti-trust Act. He followed the principle applied by this Court in *Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co.,* 204 U. S. 426, *B. & O. R. Co. vs. Pitcairn Coal Co.,* 215 U. S. 482 and *Robinson vs. B. & O. R. Co.,* 222 U. S. 506. The same principle has been since re-announced by this Court in *Proctor & Gamble Co. vs. United States,* 225 U. S. 282.

That the establishment or non-establishment of a through route in a given instance is administrative in its nature, and that the determination of the necessity for its establishment is, in the first

instance, committed exclusively to the judgment of the Commission by Section 15 of the act, seems too clear for argument. Whether the action be a civil or a criminal one, there is no standard by which the jury could determine whether, in a given instance, a through routing agreement should or should not have been made.

If by means of a criminal prosecution, the Court could inquire into and determine whether a through route should or should not have been established in a particular case, the confusion and divergence of practice resulting therefrom would be as great as if the same question was determined in a civil proceeding before the courts. The jury in one Court might find that the through route should have been established, and in another Court find just the contrary. Or, it is conceivable that a determination reached by a jury in a criminal case would be totally at variance with a decision reached by the Commission on the same state of facts. The law does not fix any standard by which the Court or jury is to be guided on such a question. We therefore insist that there is no obligation upon the defendant Railway Company to establish a through route in connection with the Humboldt Steamship Company or any other Company in the absence of

action by the Commission establishing such route; and that in the absence of such action by the Commission, it is not competent for the Court to inquire into or determine whether the facts and circumstances of the particular case were such that a through routing regulation ought to have been established; and that it follows as a consequence that the charge in the indictment that the Railway Company entered into agreements for through routing with defendant Steamship Companies and refused to make such agreements with other companies does not charge the doing of any wrongful act, nor present any issuable fact to be submitted to the jury.

There being no allegation in the indictment that the defendant carriers had not filed and posted their schedule of rates as required by the Act, it must be presumed on this hearing that they had fully complied with the law in that respect, and that their schedules, showing these rates and agreements, including the wharfage charges, were lawfully filed, and were therefore the lawful rates controlling this traffic. In this view, the situation was very similar to that presented in *Southern Pacific Railway Co. vs. I. C. C.*, 200 U. S. 536. In that case it was charged that the exclusive control

retained by the initial carrier over the routing, in connection with through rating agreements with a few only of its eastern connections, constituted a combination or conspiracy for pooling; while here it is charged that the through rating agreements, without any expresss reservation of the control of the routing, constitutes an undue restraint of trade. The answer to the contention in each case is the same—that the right to make through rating with some carriers and to refuse to make similar agreements with others, being recognized by law and countenanced by the Interstate Commerce Act, the exercise of such right cannot, in and of itself, be held to amount to undue restraint of trade or unlawful pooling, although it does result to some extent in restricting the power of competition among the connecting carriers.

With respect to the charge of discrimination in wharfage rates, we call attention to the fact that the Court below construed the indictment as charging only that this discrimination was made as between through routed and non-through-routed shipments. The language of the Court in that respect is as follows:

"It is also charged in the indictment that $2.00 per ton is an unreasonable wharfage rate; but shall

a jury determine that fact in the trial of a criminal action? There are a great many facts to consider in determining what would be and what is an unreasonable wharfage charge, and as before stated, the jury in their finding might differ very materially from the Interstate Commerce Commission after the latter had opportunity to consider and pass upon the question. It seems obvious that the question of unreasonable wharfage rates and the question of discriminatory wharfage rates must be determined by the Commission before the Court acquires jurisdiction either in criminal or civil proceedings to entertain controversies involving the consideration of such questions, except in case where the discrimination is practiced under substantially the same conditions and circumstances, wherein there would be no justification or reason for two juries differing in opinion as to the legality of the discrimination charged, such as instances where the jury would be required to pass upon the question as to whether the carrier had charged a shipper more than its published rates. If it be true that greater wharfage rates were charged one shipper than were charged another shipper under identical conditions, the question involved would be materially different, for then the jury would have a standard to guide them, to-wit: the minimum rates charged for such a service, as was held in the case of the *Armour Packing Company vs. United States,* 209 U. S. 56; but the various counts in this case show that the difference in the wharfage rates were charged under different conditions, one under through rating arrangements between the Steamship carrier and the Railroad, and the other in the absence of such though rating arrangements."

Transcript, page 50.

This construction of the indictment by the

Court below, showing a difference in the conditions under which the different wharfage rates were charged, is binding upon this Court.

United States vs. Biggs, 211 U. S. 507;
United States vs. Patten, Jan. 6, 1913;
United States vs. Winslow, Feb. 3, 1913.

Where the goods were shipped under a through rate agreement, they passed directly from the ship across the wharf to the cars, whereas if they were shipped under a local rate and not through-routed they would necessarily be received by the Wharf Company and retained until they were shipped out under a new billing. The service rendered by the Wharf Company in the two cases, and the liability incurred by it were different. Assuming that this wharfage service is a part of commerce and is under the control of the Commission as a facility of Interstate Commerce, it is manifest that the question whether the difference in the service rendered by the Wharf Company in the case of its handling of goods under a through routing and its handling goods under a local routing, were such as to justify different charges for the service, is one committed by the act to the Commission. It is thoroughly established by the authorities that a through rate may reasonably be less than the sum

of the local rates, because of the difference in the service, and that a carrier may lawfully accept as its proportion of a through rate, a sum less than its local rate for the same haul. The same considerations justify different wharfage rates on through and local shipments.

We assume that the wharf is to be treated on this hearing as a facility of the railroad, and subject to regulation by the Commission as such. In some of the counts it is alleged to have been used as the terminus of the railroad, (Trans., page 4), and in others it is charged that it "constituted a part and portion of the facilities and instrumentalities used by the said railroad in transacting said transportation business" (Trans. page 13). The Court below construed the indictment as properly charging that the wharf was an instrumentality of the railroad, and as such subject to regulation by the Commission. This construction we assume to be controlling on this review.

The reasonableness of the wharfage rate on local shipments, and the reasonableness of the difference in the rate on local and on through-routed shipments, are questions for the solution of which there is no certain or fixed standard, and upon which different men might reasonably reach differ-

ent conclusions. To make criminality depend, not upon facts, but upon the view of a jury as to the reasonableness of rates, is contrary to fundamental principles.

Tozier vs. United States, 52 Fed. 917;

Van Patten vs. C. M. &St. P. Railway Co., 81 Fed. 545.

III.

There is another and, we think, conclusive reason why the facts shown in these indictments—the refusal of the defendant Railway Company to enter into through routing agreements with the Humboldt Steamship Company or any other given Company—cannot be considered a denial of any right. As stated above, the through line from Skagway to the Yukon River points over which it is alleged in the indictment the through routing was refused, is composed of three separate railroad lines owned and operated by different companies, and by a fourth Steamship Company operating vessels on the Yukon River. The defendant Railway Company is alleged to have owned and operated a railroad from Tide Water at Skagway to the boundary line, a distance of approximately twenty miles. There is no allegation in the indictment that a through routing agreement over this line was

ever asked for or refused by the Railway Company. From the international boundary line the carriers making up the through line were severally the British Columbia Railroad Company, the British Yukon Railroad Company, and the British Yukon Navigation Company, each owning and operating its own section of the through line. While it is alleged that the lines from Skagway to Dawson were under one and the same management and operated as one continuous line, it is not alleged that the defendant Railroad Company or any of the other defendants had any interest in or control over or participated in the operation of either of the three foreign lines. The defendants are not alleged to be the persons and individuals owning and controlling the stocks and bonds of the four corporations, nor is it alleged that they had the management of either of the foreign lines. These three foreign corporations are alleged severally to have operated and owned their own lines. It is entirely consistent with the indictment that the stock of the foreign lines as well as of the defendant Railway Company, were owned by the same individuals and persons in Canada or in London. That the laws of the United States cannot make it either criminal or wrongful for the owners of a foreign

railroad to refuse to enter into traffic agreements with any other carrier whether located within or without the United States, and involving a carriage in such foreign country, is a self evident proposition. It would seem to be equally self evident that it is not and cannot be criminal or wrongful for the defendant Railway Company or its officers to refuse to extend through-routing privileges over railroads and steamship lines owned and operated by other corporations in a foreign country. The utmost that it was within the power of the defendant Railway Company to grant to either the Humboldt Steamship Company or any other company, was through-routing and through-rating privileges from Skagway to the boundary line over the railroad owned and operated by the defendant company. This right however was never demanded by any other company, and it was not alleged that it was ever refused. It is manifest that neither the defendants nor the Interstate Commerce Commission itself had any power to establish through-routing and through-rating over these foreign lines without the consent of the owners and operators of such foreign lines.

If the Railroad Company was under an obligation to grant through-routing privileges from

Skagway through these foreign countries to Dawson and other river ports, each Steamship Company connecting at Skagway was equally under an obligation to establish a through route with the railroad lines. Under the Carmack amendment the initial carrier is made liable to the shipper for loss or damage to goods suffered by the fault of the carrier on any connecting line. In the case of goods originating on a steamship line destined to Dawson, and loss or damage during the carriage in the foreign country, the liability of the initial carrier would be determined by the laws of the United States. The liability of the Canadian Company would be determined by Canadian laws. The Steamship Company would be held responsible as the initial carrier under the Carmack amendment and could not avail itself of any provision of the bill of lading exempting it from liability through negligence of servants. Under the Canadian law the Canadian Company would be given the benefit of such stipulations in the bill of lading. These and similar considerations, make it obvious that our laws relating to Interstate and Foreign commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries; and we think it equally clear that our laws cannot be extended so as to control or affect the foreign

carriage. The bearing of the anti-trust statute upon acts done in foreign countries was considered in the case of *American Banana Company vs. United Fruit Company,* 213 U. S. 347, which was an action for treble damages under section seven of the Anti-Trust Act. The alleged conspiracy was formed in the United States to control and monopolize the banana trade in the United States. The acts alleged as carrying out the conspiracy and effecting the monopoly took place in a foreign country. The Court says:

"Giving to this complaint every reasonable latitude of interpretation, we are of opinion that it alleges no case under the Act of Congress and discloses nothing that we can suppose would have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."

IV.

If, as we have attempted to show, the acts charged against the defendants were lawful at common law, and are not forbidden by the Interstate Commerce Act, can it be held that they constitute either undue restraint of trade or undue discrimination? The refusal by the Railroad Company to give to the Humboldt Steamship Company, or any other Company, privileges which it was

under no legal obligation to give, and to which such other Company was not legally entitled, cannot be made the basis of a charge of either undue discrimination or undue restraint of trade. This must be so, because otherwise the right to give or refuse the privilege is denied. The carrier having the right to extend his service beyond his own line by through routing agreements, or to refuse to so extend it, owes no duty to the public to either exercise or decline to exercise the right to so extend. Back of any idea of undue discrimination or undue restraint, there must be found a duty resting upon the carrier with respect to the particular thing about which the discrimination is charged. *A. J. & F. S. vs. Tiedt,* 196 Fed. 349. The principle is practically the same as that applied by this Court in the Express cases, 177 United States, 1, and in *Donovan vs. Pennsylvania Company,* 199 U. S. 279. In the former case, this Court held that a Railroad Company, in exercising its right to carry express matter, or to permit an Express Company to do an express business over its line, had a right to select the Express Company with which it would so contract, and, that therefore no other Express Company had a legal ground of complaint because it was refused the same privilege. In the Donovan case the Railroad Company granted to the Parmelee

Transfer Company the exclusive right to come on its station premises for the purpose of soliciting passengers and baggage for transfer to hotels and other points. This Court upheld the right of the Company to make such a contract exclusive, and held that other Transfer Companies could not complain of discrimination for the reason that the Railroad Company was under no duty to furnish such facilities, and if it did furnish them, it had the right to select its own agents. The same principle is applied in the granting of news privileges on trains, luncheon privileges on station grounds, and in contracts with Sleeping Car Companies. The principle is applied in *Gamble-Robinson Company vs. Railroad,* 168 Fed. 161. In that case, the Railroad Company accepted shipments of produce consigned to the complainant only on condition of pre-payment of freight, while it customarily accepted similar shipments of produce consigned to competitors of the complainant without requiring such pre-payment. Complainant alleged that the Railroad Company in so discriminating against it was actuated by a purpose to harrass and annoy, and to give an undue advantage to its competitors. The Circuit Court of Appeals held that the Railroad Company had the legal right to compel pre-payment of all freight received, and that its exercise of this

right as to complainant, and the waiver of pre-payment as to other shippers or consignees, was not the deprivation of any right to which the complainant was entitled, and could not be made the basis of a charge of wrongful conduct on the part of the railroad. Another case more analogous to the present one in its facts was that of *G. C. & S. R. Company vs. Miami Steamship Company,* 86 Fed. 407. That was a bill in equity seeking a mandatory injunction against the defendants to restrain them from continuing certain practices, which were alleged to be in violation of the Interstate Commerce Act, and in violation of the Sherman Anti-Trust Act. It was alleged that the Miami Steamship Company and the Mallory Steamship Company were each operating lines of vessels between Galveston and New York, as common carriers, and in competition with each other; that the three defendant Railroad Companies were common carriers, having their terminus at Galveston; that these Railroad Companies and the Mallory Steamship Company entered into an agreement called a conference or associaetion, and that one of the rules adopted by the association was to the effect that neithr member of the association would make through routing or through rating connections with any carrier not a member of the association; that by

the agreement the Railroads were at liberty to and did enter into a through routing and through rating agreement with the Mallory line, and were obligated to refuse to grant similar privileges to the Miami line, but should exact local rates for all traffic received from the Miami line, these local rates being in excess of the through rates on similar traffic received from the Mallory line. The Court held that the agreement between the Railroads and the Mallory line was one within their legal rights, and that the Miami Company was not entitled to any relief. It was held that the agreement between the Railroads and the Mallory line for exclusive through routing privileges and through rating was the mere exercise of their legal rights, and did not constitute a violation of the Anti-Trust Act, even though it was a part of the agreement that he Miama line should no be permitted to enjoy the same privileges in its interchange of traffic with the Railroad Companies.

III.

With respect to Counts 1 and 2, the allegations of the indictment are too general and indefinite. The indictment charges that the defendant Railroad Company entered into through traffic arrangements with the defendant corporations, and established

through rates, and refused to enter into such joint through traffic arrangements with any other carrier or carriers. There is no allegation in these two counts that thee was any other carrier operating a line of steamships between Skagway and the southern ports named, nor is there any allegation that any other carrier offered to establish any such line or offered to enter into traffic arrangements with the Railroad Company. Assuming that it was the duty of the Railroad Company to enter into such arrangements with every connecting carrier, the indictment should have charged that there were other connecting carriers with whom it refused to enter into such arrangements, and should have named such other carriers, and averred an offer upon the part of such other carriers to enter into such traffic arrangements on reasonable and proper terms, setting forth what such terms were. These allegations were necessary in order to enable the defendants to intelligently prepare for their defense, and to be able to plead the judgment in this case in bar of any subsequent prosecution.

For the foregoing reasons the Defendants in Error respectfully pray that the judgment of the lower Court be affirmed and the appeal dismissed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 697.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION No. 1.

MOTION TO DISMISS WRIT OF ERROR.

Come now Pacific and Arctic Railway and Navigation Company, a corporation; Pacific Coast Steamship Company, a corporation; Alaska Steamship Company, a corporation; Canadian Pacific Railroad Company, a corporation; The North Pacific Wharves and Trading Company, a corporation; C. E. Wynn Johnson, Ira Bronson, J. C. Ford,

Charles E. Peabody, G. H. Higbee, J. H. Bunch, E. C. Ward, J. H. Young, and F. B. Wurzbacher, defendants in error herein, and move the court to dismiss the writ of error herein for want of jurisdiction in this court to hear and determine the same.

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LEWIS P. SHACKLEFORD,
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION No. 1.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

The defendants in error were indicted in the district court of the United States for the district of Alaska, division No. 1, on February 13, 1912. The indictment contained six counts, two of them charging violations of the act known as the "Sherman Anti-trust Act," three of the counts charging violations of the Interstate Commerce Act, and the remain-

ing count charging violation of the Conspiracy Act. Demurrers to each of these counts were interposed by each of the defendants in error. After a hearing upon the demurrers an order was entered by said court on May 3, 1912, sustaining the demurrers of all of the defendants to counts 1, 2, 3, 4, and 5 of the indictment, and also sustaining the demurrers of the individual defendants to count 6, and overruling the demurrers of the corporation defendants to said count. This writ of error was taken out by the United States on June 1, 1912, pursuant to the provisions of the act of March 2, 1907, which authorizes writs of error from the district and circuit courts direct to this court in all criminal cases from a decision or judgment sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the construction of the statute upon which the indictment is founded. The motion to dismiss the writ of error is based upon the contention that this act of March 2, 1907, is superseded and repealed by the Judicial Code, which became effective January 1, 1912, at least in so far as it conferred appellate jurisdiction in criminal cases upon this court, and that this court has therefore no jurisdiction to entertain this writ of error.

The Judicial Code is an act codifying, revising, and amending all laws relating to the judiciary. It is not one act in a series of legislation, and to be made to fit into the provisions of prior legislation, but is a single, complete act, the outcome of previous experiments and the expression of the final judgment of Congress upon the general subject of the statutory laws relating to the judiciary, including the appellate jurisdiction of this court. The enacting clause reads as follows:

> "That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections entitled, numbered, and to read as follows."

The body of the act is as broad and comprehensive as the enacting clause, and covers the general subjects of the organization, terms, and jurisdiction of all Federal courts, and defines specifically, and in detail, both the original and appellate jurisdiction of this and of all other Federal courts in all classes of cases. Both the title and the enacting clause manifest the purpose of Congress to codify, revise, and amend *all* laws relating to the judiciary, and to adopt a comprehensive Judicial Code covering the entire subject, and complete in itself. The body of the act does in fact cover the whole field of statutory law relating to the judiciary, and manifests the intention of Congress "to make a new law, so far as the present law differs from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it."

Murdock vs. City of Memphis, 20 Wall., 590, 617.
Eckloff vs. District of Columbia, 135 U. S., 240.
District of Columbia vs. Hutton, 143 U. S., 18.

The enacting clause of the Judicial Code clearly implies a collection and compilation, revision, and amendment of all statutes relating to the judiciary—a restatement of those laws in a corrected or improved form.

> "Revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material changes. A revision is intended to take the place of the law as previously formulated. By adopting it the legislature say the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute; it replaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is contained in operation as

it may operate in the connection in which it is re-enacted."

Sutherland on Stat. Const'n, sec. 154.

"A revising statute embracing antecedent general laws on various subjects and reducing them to one system and one text, repeals all prior statutes upon the same subjects not included in the body of the revision and not exempted by an express clause."

Ib., sec. 155.

36 Cyc., p. 1079, and cases there cited.

This is the rule applied by this court to the Revised Statutes in *United States vs. Bowen,* 100 U. S., 508, and the numerous subsequent cases following. It will be noted that the repealing clause in the Revised Statutes is no more comprehensive than the repealing clause in the Judicial Code.

That the act of March 2, 1907, is a law "relating to the judiciary" is too clear for argument. If Congress meant by the Judicial Code to codify, revise, and amend *all* of the laws relating to the judiciary, to read as therein set out, there can be no escape from the conclusion that the act of 1907 was so "revised and amended," and that only such portions (if any) remain as are preserved in the new act. It will not be contended, however, that this court has jurisdiction in this case if it is controlled by the terms of the code.

Section 236 of the Judicial Code defines the appellate jurisdiction of this court as follows:

"The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for."

The sections immediately following enumerate and define the classes of cases which can be brought direct to this court by appeal or writ of error. The case at bar does not fall within any of the classes of cases so enumerated. It seems manifest that section 237 means that this court shall have appellate jurisdiction in the cases thereinafter specially provided for, and in no other cases.

Under section 5 of the act of March 3, 1891, creating the circuit courts of appeal, writs of error could be taken direct to this court from the district courts "in cases of conviction of a capital crime." Under section 238 of the Judicial Code this jurisdiction is withheld from this court, and by section 128 conferred upon the circuit courts of appeal. We apprehend that the plaintiff in error will not contend that this court can at this time exercise appellate jurisdiction over capital convictions, although section 5 of the act of 1891 is not mentioned nor expressly repealed by the Judicial Code. It must be held to be repealed because the laws relating to the general subject have been revised and enacted in an amended form and because section 5 of the act of 1891, in so far as it gives this court jurisdiction over capital crimes, is inconsistent with section 128 of the Judicial Code, which gives the circuit courts of appeal exclusive jurisdiction of all writs of error in all criminal cases. The argument against the jurisdiction of this court in cases of capital conviction, however, is no stronger nor more cogent than in the case at bar. Neither of the original statutes is repealed in express terms by the new act; but their provisions, in each instance, conflict with the scheme of the new act, which gives exclusive jurisdiction to the circuit courts of appeal of all writs of error in all criminal cases.

It is manifest that one of the purposes of the Judicial Code was to relieve the Supreme Court from considering certain classes of cases in which it had theretofore possessed jurisdiction. *American Security & Trust Co. vs. District of Columbia,* 224 U. S., 491, 495. Hence its jurisdiction in any case or class of cases will not be presumed, but the same must be clearly shown to be comprehended in some provision of said code.

Section 247 of the Judicial Code confers upon this court jurisdiction on appeals and writs of error from final judgments and decrees of the District Court for the District of Alaska in prize cases, and in all cases which involve the

construction or application of the Constitution of the United States or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the United States. The position of the plaintiff in error involves a holding by this court that section 236 of the code does not mean that this court shall have appellate jurisdiction only in the cases thereinafter specially provided for, and that the enumeration of these cases in the succeeding sections was not intended by Congress to cover the entire field of the appellate jurisdiction of this court, and that the appellate jurisdiction of this court with respect to judgments and decrees of the District Court for the District of Alaska is not limited to the cases mentioned in section 247. Such a construction of the statute is, we think, wholly inadmissible.

The code defines the jurisdiction, both original and appellate, of all Federal courts. Section 24 provides: "The district court shall have original jurisdiction as follows," and thereupon enumerates the classes of cases falling within the jurisdiction of that court We assume that no one would contend that the jurisdiction of the district courts is not limited to the particular cases and subjects mentioned in this section; and yet that jurisdiction is defined by the act in the same manner as is the appellate jurisdiction of this court. If it is permissible for this court to entertain jurisdiction in cases covered by the older statutes, but omitted from the Judicial Code, it is equally permissible to look to prior statutes in determining the jurisdiction of the district court.

The purpose of the codification of the laws on a given subject is to collect, arrange, and systematize all of the laws relating to that subject, and when the act providing for such codification further declares its purpose to revise and amend the laws relating to that subject, it necessarily follows that the new act embodying such codification, revision, and

amendments supersedes all previous laws upon that subject, whether specifically referred to or not. The omission of any previous law from such a code is evidence of an intent to repeal it. The whole purpose of the codification and revision of existing laws by a new enactment would be defeated if it should be held that all previous laws relating to the same subject, and not expressly repealed, remained in force. The omission from the code of any particular statute relating to the judiciary was a proper and convenient way to amend these laws. That it was the intent of Congress to repeal all laws relating to the judiciary not brought forward in the Judicial Code is further manifested by chapter 14 of the act, which provides, after specifically repealing certain designated statutes, that—

> "All other acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed."

Not only is the general subject-matter of the appellate jurisdiction of this court covered by the terms of the Judicial Code, but the subject of appellate jurisdiction in criminal cases in all Federal courts, and the specific subject of appellate jurisdiction over the judgments of the district courts of Alaska are also specifically covered.

Whether the right of the United States to a writ of error from a judgment in a criminal case sustaining a demurrer to all or some of the counts of an indictment, given by the act of March 2, 1907, exists since the enactment of the Judicial Code, is a question not necessarily involved in this case. If such right still exists, the writ of error will lie to the Circuit Court of Appeals for the Ninth Circuit, under the provisions of section 134, reading as follows:

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in section 247, in which the amount involved or the value of the subject-matter in controversy shall exceed $500.00, and

> in all criminal cases, writs of error, and appeals shall lie from the District Court for Alaska, or from any division thereof to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders and decrees of said court shall be final in all such cases. But whenever such Circuit Court of Appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the Circuit Court of Appeals."

The clear effect of this statute is to confer upon the Circuit Court of Appeals for the Ninth Circuit exclusive jurisdiction of writs of error in criminal cases from the district court of Alaska. It is inconsistent with, and repugnant to, the act of March 2, 1907, in so far as the latter act conferred jurisdiction upon this court to review by writs of error certain classes of such orders and judgments in criminal cases.

The act of March 2, 1907, is not a special or local act within the meaning of the rule that a general act will not ordinarily be construed to repeal a special or local act unless there is some express reference thereto or a complete inconsistency between the two. It is a general act applying to a particular class of judgments in all of the district and circuit courts of the United States (and, as must necessarily be contended by the Government, including all territorial courts). It is general in its application to all of these courts and limited only with respect to certain kinds of judgments in criminal cases It is much more general in its nature than was the act of May 14, 1898, relating to the revision of transportation charges by railroads in Alaska, which was held by this court in *Interstate Commerce Commission vs. United States ex rel. Humboldt Steamship Company,* 224 U. S., 474, decided April 29, 1912, to have been repealed by the amendment to the Interstate Commerce Act of

1906. The act of May 14, 1898, section 2, provided in substance that the charges for transportation of freight and passengers on railroads in Alaska should be printed and posted as required by section 6 of the Act to Regulate Commerce, and that such rates should be subject to revision and modification by the Secretary of the Interior. The act was special or local in that it applied only to railroads in Alaska. By the amendment of the Interstate Commerce Act of June, 1906, the Interstate Commerce Commission was given the power to prescribe rates, and the provisions of the act were extended to intraterritorial commerce. The question in the case referred to was: Did this amendment of the Interstate Commerce Act operate to repeal by implication that provision of the act of 1898 conferring upon the Secretary of the Interior the right of revision over rates in Alaska? This court, in holding that the prior act was repealed by implication, says:

> "The amendment made the act completely comprehensive of the whole subject, and entirely superseded the minor authority which had been conferred upon the Secretary of the Interior."

We most respectfully urge that this court is without jurisdiction in this case, and that the motion to dismiss the writ of error should be sustained.

Respectfully submitted,

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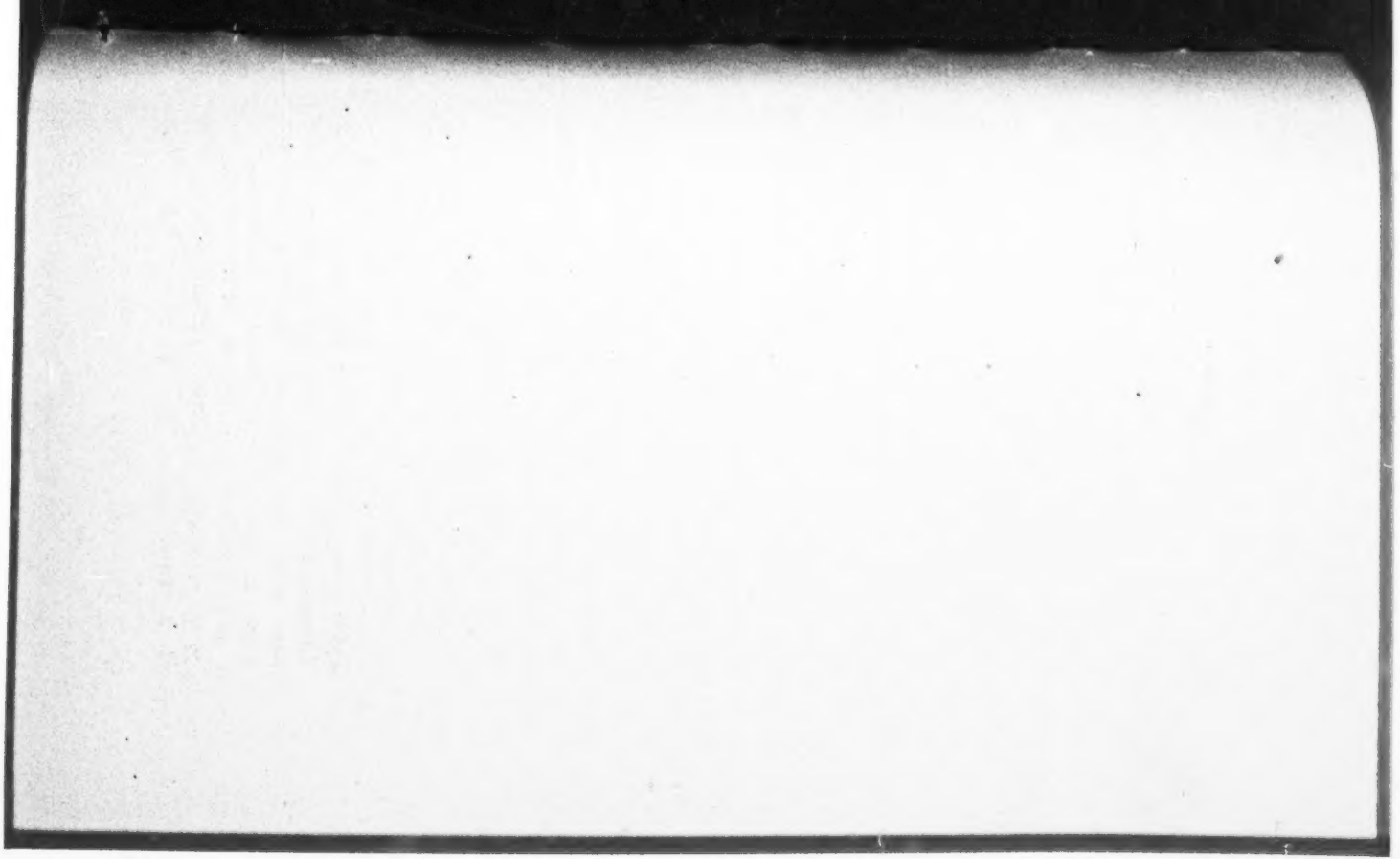

In the Supreme Court of the United States.

OCTOBER 12, 1912.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *v.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION Company and others, defendants in error.	No. 697.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

This is a writ of error brought by the United States to review the judgment of the District Court for Alaska, division No. 1, sustaining demurrers to an indictment charging the defendants with violating the Sherman antitrust law and the acts to regulate commerce.

The writ is brought under the so-called criminal appeals act of March 2, 1907, and defendants in error move to dismiss on the ground that that act is repealed by the Judicial Code.

ARGUMENT.

The defendants' argument is that the Judicial Code purports to codify all laws relating to the judiciary, and that since the act of 1907 relates to the judiciary, and is not specifically included therein, it is repealed.

We think it is demonstrable that Congress did not intend to codify *all* the laws relating to the judiciary; that it intentionally omitted the criminal appeals act and many other statutes which were to be later revised, but which were not repealed.

1. *Congress did not codify all laws relating to the judiciary.*

It is true that the enacting clause reads:

> That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows:

But the repealing section, 297, must be examined to find whether Congress intended the code to take the place of *all* laws relating to the judiciary. That section, after repealing certain statutes in terms, concludes:

> Also all other acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed.

If there be any laws relating to the judiciary which are not repealed by name, and are neither embraced within nor superseded by the code, they are still intended to be in force.

And there are many such laws. For instance, under *Title XIII* of the Revised Statutes, entitled "The Judiciary," appear chapters on district attorneys, marshals and clerks, fees, evidence, procedure, and limitations (chaps. 14, and 16 to 19). These are all laws "relating to the judiciary," but they are not included in the Judicial Code, and it would be absurd to say that they are repealed by that act.

And it appears from the report of the special joint committee on the revision of the laws (hereafter quoted) that these chapters were not intended to be included in the code.

A similar course was followed in the revision known as the Criminal Code, which undertook to codify the penal laws of the United States. An appendix to that code refers to permanent laws having penal provisions not properly separable from administrative provisions not contained in the code, but to be embraced in a subsequent general revision.

2. *The criminal appeals act was not expressly repealed by the code.*

Section 297 does not mention this act in the list of those repealed. And as said by this court in Johnson *v.* United States (225 U. S., 405, 419), in considering an identical provision of section 341 of

the Criminal Code this failure to mention the criminal appeals act is a cogent reason for the conclusion that it and the Judicial Code were intended to exist together.

3. *The act of 1907 is not repealed by the concluding paragraph of section 297 of the code, because it is neither embraced within nor superseded by the code.*

The criminal appeals act of 1907 provides:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy.
>
> The writ of error in all such cases shall be taken within 30 days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

> Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided,* That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant. (34 Stat., 1246.)

This act conferred upon the United States a right of review in criminal cases, a right which this court had held did not exist under the prior statutes. (*United States* v. *Sanges,* 144 U. S., 310.)

The sections of the code dealing with appeals and error do not embrace the language of the criminal appeals act, but simply repeat in terms the earlier statutes which this court had held in *United States* v. *Sanges* did not give to the United States the right of review in any criminal case. These sections must still be construed as in the Sanges case, and the code therefore neither embraces nor supersedes the criminal appeals act.

The pertinent provisions of the code are sections 238 and 247, and sections 128 and 134 dividing appellate jurisdiction over the district courts between this court and the Circuit Court of Appeals.

Under section 238 an appeal or writ of error may be taken direct to this court in any case in which the jurisdiction of the trial court is in issue; in final sentences in prize causes; in any case involving the construction or application of the Constitution, the constitutionality of a law of the United States, or

the validity or construction of a treaty; or in any case in which the constitution or law of a State is claimed to contravene the Federal Constitution.

Section 247 confers the same jurisdiction to review the judgments of the District Court for the District of Alaska, except that it omits reference to cases in which the jurisdiction of the trial court is in issue.

Neither of these sections mentions criminal cases, and they do not therefore embrace any part of the criminal appeals act.

Section 128 provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review final decisions in the district courts in all cases other than those which might come direct to this court, as provided in section 238, and the judgments of the Circuit Courts of Appeals shall be final in all cases, among others, arising "under the criminal laws."

According to section 134, in all cases in which appeal or writ of error does not lie to the Supreme Court, if the amount involved exceeds $500, and in all criminal cases writs of error and appeals lie from the District Court for Alaska to the Circuit Court of Appeals for the Ninth Circuit, the judgments of which shall be final.

All appellate jurisdiction referred to in the Judicial Code is now lodged in the circuit courts of appeals in all cases arising under the criminal laws. Therefore, if the provisions of the criminal appeals

act are to be found anywhere in the Judicial Code they are in these sections, or for all practical purposes in section 128.

In *Sanges* v. *United States* (144 U. S., 310, supra) it was urged that the identical language of section 128, then contained in section 6 of the circuit court of appeals act, gave to the United States the same right which was later conferred by the criminal appeals act. In denying this contention, this court said (p. 323):

> The provision of section 6, giving the Circuit Courts of Appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and can not therefore be presumed to have been intended to confer upon the Government the right to bring it.
>
> In none of the provisions of this act defining the appellate jurisdiction, either of this court or the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

And in *United States* v. *Dickinson* (213 U. S., 92) this court held that other language used in section 6 of the act of 1901, authorizing this court by the writ of certiorari to review any decision

made final in the Circuit Court of Appeals, did not authorize a writ of certiorari to be issued at the suit of the United States in criminal cases.

So that when Congress repeated in section 128 the language of section 6 of the Circuit Court of Appeals act, it must be held to have adopted the construction placed on that language by this court.

The Abbotsford (98 U. S., 440, 444).

4. *This conclusion is confirmed by the reports of the commission to codify the laws and of the Special Joint Committee of the Senate and House of Representatives on the Revision of the Laws.*

The commission to codify and revise the laws made its final report on December 15, 1906.

The report consisted of two parts, the notes of the revisers and the revision in sections.

The commission reported the statutes relating to the judiciary under Title XVI in 20 chapters. Chapter 16 was devoted to procedure on error and appeal.

At the time of this report the criminal appeals act had not been passed, but a section embodying the substance of a pending bill was incorporated as section 1678 in chapter 16. The reason for this was given at page 39.

By joint resolution of March 2, 1907 (34 Stat., 1423), and of March 4, 1909 (35 Stat., 1169), a Special Joint Committee on the Revision of the Laws was appointed, which took up the report of the commission. This joint committee has made yearly revisions of the commission's report.

In the revision of December 2, 1907, the criminal appeals act, having been passed, was substituted as section 1678 under chapter 16, on procedure on error and appeal.

The criminal appeals act was continued as section 1678, chapter on procedure on error and appeal, in the revisions of 1908, 1909, and 1910 (p. 168, revision of 1908; p. 172, revision of 1909, chapter 17; revision of 1910, p. 172, chapter 18).

The joint committee, having first disposed of the Criminal Code (act of Mar. 4, 1909, 35 Stat., 1088), in March, 1910, reported to the Senate and House a draft of the Judicial Code.

The bill was known as Senate bill 7031, and the Senate members of the joint committee on March 14, 1910, submitted a report (Rept. 388), in which they stated that the bill did not include five chapters of the judiciary title, among the omitted chapters being 18 on procedure, which contained the criminal appeals act as section 1678.

In explaining the omission the committee said (p. 2):

> The chapters of the judiciary title that are not included in this bill are of such character that their provisions will necessarily be adapted to the final conclusions of the Senate on this bill, and your committee has thought best to defer reporting them as a part of this bill because of the obvious changes that may be necessary in them because of the action of Congress on this bill.

The hope was expressed that the remaining chapters of the judiciary title might be reported in time to be considered as amendments to the pending bill, but this was not done.

It can not be more clearly shown that the committee having in charge the Judicial Code intended not to embrace within it any part of the criminal appeals act.

And that this intention was accomplished appears from the Senate report just mentioned.

On page 2 the committee states that it presents a report in two parts:

> Part 1 contains a succinct reference to every section of the Revised Statutes and every existing statute incorporated either in form or substance into the bill reported, stating the status of the law and the reason for changes where changes have been made.
>
> Part 2 contains the text of the bill as reported, with the existing law printed on the page opposite each of the sections referred to.

In this report section 238 of the code appears as section 225. On page 77 of Part 1 it is stated that the only change made in the section is striking out the words " in cases of conviction of a capital crime," thus transferring the jurisdiction in capital cases to the Circuit Court of Appeals.

On pages 438 and 440 (Part 2) the section appears in full, while on 439 and 441 are quoted section 5 of the circuit court of appeals act, the act of

January 20, 1897 (29 Stats., 492), conferring jurisdiction on the Circuit Court of Appeals in criminal cases not capital, and the act of March 3, 1909 (35 Stats., 838), relating to the jurisdiction to review decisions of the District Court of Hawaii.

Section 247 of the Judicial Code appears in this bill as section 234. On page 80 of Part 1 is a reference to the statutes from which the section is taken, with a statement that the only change is to confer jurisdiction in capital cases on the Circuit Court of Appeals. Both the section and the statute from which it is taken are quoted in full on pages 448 to 451 of Part 2.

Section 128 of the code appears as 127 in this bill. On pages 52 and 53 of Part 1 it is stated that this section is existing law. The section itself and the statutes from which it is taken appear on pages 328 to 331 of Part 2.

Section 134 of the code appears in the bill as section 133. On page 55 of Part 1 it is stated that the only change is to confer jurisdiction in capital cases on the Circuit Court of Appeals. The section and the statutes from which it is taken appear on pages 336 to 338 of Part 2.

Nowhere in this report of the joint committee is there a reference to the act of March 2, 1907, so that in the opinion of the members of that committee, to use their own language, the act of 1907 was not incorporated, either in form or substance, in the code as passed, and hence has not been repealed.

II.

The criminal appeals act authorizes writs of error to the District Court for the District of Alaska.

Although the defendants in error have not raised this question, fairness to the court requires that attention should be directed to this point in order that no decision on so important a matter should be made without full consideration by the court.

1. The act in terms authorizes a writ of error "from the district or circuit courts."

The District Court for the District of Alaska is such a district court.

The first court in Alaska was established under the act of May 17, 1884 (23 Stat., 24), creating a civil government for Alaska, which provided that Alaska shall "constitute a civil and judicial district." In section 3 it was provided that there should be established—

> A district court for said district, with the civil and criminal jurisdiction of district courts of the United States and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction not inconsistent with this act as may be established by law.

This court was a territorial court (*McAllister* v. *United States,* 141 U. S., 174), and was not a district court within sections 4, 5, and 6 of the circuit court of appeals act of March 3, 1891 (26 Stat., 826), but was the supreme court of the territory of Alaska

within section 15 of that act authorizing appeals and writs of error to the circuit court of appeals (*Steamer Coquitlam* v. *United States,* 163 U. S., 346); but it has been held to be a district court of the United States within the meaning of section 688, Revised Statutes, authorizing this court to issue a writ of prohibition to the district courts when proceeding as courts of admiralty (*In re Cooper,* 138, 404; 143 U. S., 494) and a district court of the United States for purposes of appeal (*In re Cooper,* 143 U. S., 472, 510).

Since these decisions, by the act of June 6, 1900, making further provisions for a civil government for Alaska, it was provided in section 4 of Title I, chapter 1 (31 Stats., 322):

> There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity, and admiralty causes.

This section was amended March 3, 1909 (35 Stats., 839), to read:

> That there is hereby established a district court for the District of Alaska, with the jurisdiction of circuit and district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes.

That this court is a court of the United States is settled. See—

Embry v. *Palmer* (107 U. S., 3, 9), the Supreme Court of the District of Columbia is a court of the United States.

Benson v. *Henkel* (198 U. S., 1, 13) and

Hyde v. *Shine* (199 U. S., 62, 75) (the District of Columbia is a district of the United States within section 1014, Revised Statutes, authorizing the removal from one district to another of persons charged with crime).

United States v. *Haskins* (3 Sawyer, 262) (the District Court for the Territory of Utah is a court of the United States within section 33 of the Judiciary Act from which 1014, R. S., is taken).

Moss v. *United States* (23 App. Cas., D. C., 475) (the courts of the District of Columbia are United States courts within section 725, Revised Statutes, relating to contempts).

The District Court for the District of Alaska is, therefore, within the letter of the criminal appeals act of 1907.

2. The reasons for the act apply to the District Court for the District of Alaska.

The act had two purposes: First, and most important, to obtain at the hands of this court an authoritative construction of the criminal statutes of the United States; and, second, to prevent the escape of an individual charged with crime because of the misconstruction of such a statute by a district court.

The District Court for the District of Alaska has the same jurisdiction as other district courts to construe the criminal laws of the United States. The evils sought to be corrected by the act of 1907 are just as apt to arise in the District of Alaska as

elsewhere throughout the United States, and it is equally important to the United States to have the decisions of that court reviewed.

Indeed, the present case is a good illustration of this point. The indictment charges the appellees with violating the Sherman law and the acts to regulate commerce; the district judge has held that the United States is without power to prosecute these charges until the Interstate Commerce Commission has decided that the facts alleged do constitute a violation of the acts to regulate commerce.

There is thus established a precedent which will embarrass and hinder the United States in the prosecution of other persons charged with a like offense in any part of the United States, and, in the case at bar, the particular defendants are to go free because of an erroneous construction placed upon the statute by a single judge.

CONCLUSION.

It is, therefore, submitted that the criminal appeals act of 1907 gives to the United States the right to a writ of error to this court from any judgment described therein, rendered by a district court of the United States whether that court be created under the third or any other article of the Constitution, and that the motion to dismiss must be denied.

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Solicitor General.
JESSE C. ADKINS,
Assistant Attorney General.

UNITED STATES OF AMERICA *v.* PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

No. 697. Argued February 26, 1913.—Decided April 7, 1913.

While under the Interstate Commerce Act a carrier may select its through route connections, agreements for such connections may constitute violations of the Anti-trust Act if made not from natural trade reasons or on account of efficiency, but as a combination and conspiracy in restraint of interstate trade and for the purpose of obtaining a monopoly of traffic by refusing to establish routes with independent connecting carriers.

In reviewing the decision of the lower court sustaining a demurrer to an indictment charging a combination in violation of the Anti-trust Act, this court is not called upon to consider what the elements of the plan may be independently, or whether there is or is not a standard of reasonableness which juries may apply. If a criminal violation of the act is charged, the criminal courts have cognizance of it with power of decision in regard thereto.

A combination made in the United States between carriers to monopolize certain transportation partly within and partly without the United States is within the prohibition of the Anti-trust Act, and

also within the jurisdiction of the criminal and civil law of the United States even if one of the parties combining be a foreign corporation.

While the United States may not control foreign citizens operating in foreign territory, it may control them when operating in the United States in the same manner as it may control citizens of this country.

The purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers and carriers, and their respective rights and obligations dependent upon the act, and the conduct of carriers is not subject to judicial review in criminal or civil cases based on alleged violations of the act until submitted to and passed on by the Commission.

Quære, what the effect is of a finding by the Interstate Commerce Commission in such a case.

Where the District Court holds that the averments of the indictment are not sufficient to connect certain defendants with the offense charged, it construes the indictment and not the statute on which it is based, and this court has no jurisdiction under the Criminal Appeals Act to review the decision.

An objection to the demurrer made by certain defendants and sustained as to one count, and not passed on as to other counts which were struck down by the District Court but sustained by this court, may be raised in the District Court by such defendants in regard to such counts when the case is again before that court.

INDICTMENT for alleged violations of the Sherman Anti-trust Act and of the Interstate Commerce Act.

The indictment contains six counts. The first and second counts charge violations of the Anti-trust Law. The first by the defendants engaging in a combination and conspiracy in restraint of trade and commerce with one another to eliminate and destroy competition in the business of transportation in freight and passengers between various ports in the United States and British Columbia in the south, and the various cities in the valleys of the Yukon River and its tributaries, both in British and American territory, in the north, upon a line of traffic described, for the purpose and with the intention of monopolizing such trade and commerce. The second count charges the monopolization of trade and commerce in the

same business and between the same ports. The manner of executing the alleged criminal purpose is charged to be the same in both counts.

The places of the incorporation of the corporate defendants are alleged, and the following facts: The Pacific Coast Steamship Company and the Alaska Steamship Company operate respectively lines of steamships as common carriers of freight and passengers running in regular route between Seattle, State of Washington, and Skagway, Alaska. The Canadian Pacific Railway Company is a like carrier and operates a line of steamships between Vancouver, British Columbia, and Skagway. During the time mentioned in the indictment the Pacific & Arctic Railway & Navigation Company owned and operated a railroad from tidewater at Skagway to the summit of White Pass, a distance of about twenty miles to the boundary line between Alaska and British Columbia, at which latter point it connected with a railroad owned and operated by the British Columbia Yukon Railway Company. The latter road extended from the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and Yukon District of Canada, a distance of about twenty-five miles, at which point it connected with another railroad, owned and operated by the British Yukon Railway Company, which extends to White Horse on the headwaters of the Yukon River, in Yukon District of Canada. During all the times mentioned there was a line of steamers plying upon the Yukon River and the headwaters thereof between White Horse and Dawson, owned and operated by the British Yukon Navigation Company. The four corporations last above mentioned and their stocks and bonds were owned and controlled by the same persons and individuals, and the said three lines of railroads and their lines of steamers were under one and the same management and were operated as one continuous line

of common carriers of freight and passengers between the towns of Skagway and Dawson and way points under the name and style of the White Pass and Yukon Route, referred to as "the railroad" and had the sole and exclusive monopoly of the transportation business between Lynn Canal and the navigable waters of the Yukon River. A general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, over the designated routes and to the various places on the routes, and the shortest and most natural route for such trade and commerce was, has been, and is by water craft from said southern ports to Skagway, and thence over Moore's Wharf, so called, to the points of destination. Trade and commerce from White Horse and Dawson to said southern ports would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river and thence by the way of said railroad to Skagway, Alaska, thence over said Moore's Wharf, and thence by steamship or other water craft to the said southern ports.

The North Pacific Wharves & Trading Company was the owner and in exclusive possession and control of all of the wharves at Skagway at which steamships or other water crafts could take and discharge, or load cargo, that company having a complete and absolute monopoly of the wharfage business at Skagway and owning and operating the Moore Wharf, which wharf, by agreement between the Wharves Company and the railroad, had been made and was the terminus of the railroad over which all freight going to or coming from or passing through Skagway had necessarily to pass. The wharf was operated as a public wharf. Continuously during the three years immediately preceding the finding of the indictment the defendants combined and conspired together to eliminate and destroy competition in the transportation business between the said southern ports and Skagway, for the purpose and

with the intention of giving to and creating for the Alaska Steamship Company, the Pacific Coast Steamship Company and the Canadian Pacific Railroad Company a monopoly of such business, and, to that end, purpose and intention, entered into, and continuously maintained a joint traffic arrangement between the railroad and the steamship companies, by and through the individual defendants as officers and agents of the corporate defendants, pursuant to which arrangement either of the steamship companies could and did bill freight and passengers through from either of the said southern ports to any point on the said railway or on said Yukon River or its tributaries along and over the route of travel and transportation described, and the railroad could and did bill freight and passengers through from Yukon and other northern points to said southern ports only on ships from Skagway south, billing to either of the steamship companies. The rates for freight and passengers were fixed and an apportionment between the said respective carriers of the gross receipts was established and agreed upon. With the like intent and purpose it was agreed that the railroad should, and it did, refuse to enter into any joint through traffic arrangement with any other carrier or carriers, and refused to receive any other through billing on shipments from the said southern ports except such as arrived at Skagway by some ship belonging to one of the steamship companies, or from said Yukon points to the southern ports, except by the same ships. As part of the same combination and with the same intent and purpose it was agreed that the Wharves Company should, and it did, during all the times mentioned, charge wharfage at the rate of $2.00 per ton for all freight handled over its wharf except when the same was shipped on a vessel owned by either of the companies, or was consigned to some one who had entered into or was about to enter into a contract with either of said steamship companies to

bind himself to have all of his freight carried by such steamship company and by no one else, in which latter case a wharfage of $1.00 per ton only was charged and any charge in excess of $1.00 was unreasonably high and was exacted for the unlawful purpose aforesaid. With like intention and purpose and as part of the same combination and conspiracy, it was arranged and agreed by and between the defendants that the said railroad should, and it accordingly did, fix and establish local rates and transportation charges for freight and passengers from 5% to 25% higher than the through joint rates, differing according to classification of the various commodities shipped. Pursuant to such arrangement and the purpose and intention aforesaid, the said railroad received for through shipments, as its share of freight charges, from 15% to 30% less than it charged for the same class of freight shipped between Skagway and the same Yukon points. By reason of the facts alleged it became and was, during all of the time mentioned, unprofitable for the public to employ any carrier in the trade, traffic or commerce save and except the said steamship companies, and competition in the said water transportation between the steamship companies and other carriers was in that manner and by the means of said combination and conspiracy eliminated and destroyed, the defendants being enabled to monopolize such trade, traffic, transportation and commerce to the injury of the public.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the Interstate Commerce Act. The discrimination is charged to have been practiced against the Humboldt Steamship Company between January 1, 1909, and August 10, 1910, which company is alleged to be a California corporation and engaged as a common carrier of freight and passengers operating a line of steamers from the same ports from which the defendant steamship

companies operate their respective lines to Skagway, Alaska. In the conduct of its business the Humboldt Steamship Company operated a steamship called the "Humboldt" on a regular schedule and route between Seattle, Washington, and Skagway. "The railroad," as we have seen the White Pass & Yukon route is called in all of the counts, had entered into and maintained during the time aforesaid with the defendant steamship companies a joint traffic arrangement whereby and under the terms of which freight and passengers might be billed at a joint through rate from the said southern ports over the route described to the various Yukon points, but refused without cause or excuse to enter into a joint traffic arrangement with the Humboldt Company, though requested to do so, or to receive, carry or handle any freight billed through from Seattle to Yukon points on the railroad or the Yukon River; and neither would nor did carry any freight whatever from Skagway to any of said points in British or American territory at a less rate or charge than from 5% to 30% more, according to classification and character, than it received from the defendant steamship companies as its proportion of joint through rates from such southern points to the corresponding Yukon points. The railroad company, it is charged, caused the North Pacific Wharves & Trading Company to charge for all freight shipped on the steamship "Humboldt" for transshipment on the railroad to points along its line on the Yukon River a wharfage of $2.00 per ton, whereas it included at the same time in its portion of the through rate on through bills under its arrangement with defendant steamship companies all wharfage charges. And it is alleged that the defendants knowingly, willfully and maliciously induced and incited the railroad company to practice the discrimination described, and each and all aided and abetted one another and the railroad company in such practice.

The other facts as to routes, commerce and carriers, their relations and arrangements and the effect of them are the same as in the first and second counts, the order of statement being somewhat different.

Count 4 is the same, as to the facts alleged, as the third count except the discrimination is charged to have been practiced against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the sixth. To that, the demurrer of the individual defendants was sustained.

Mr. Solicitor General Bullitt for the United States:

The United States may indict for violations of the Sherman Anti-trust Act without the necessity of any prior action by the Interstate Commerce Commission on the facts involved.

An act may be in violation of the Sherman Anti-trust Law without being in violation of the Interstate Commerce Act. *Meeker* v. *Lehigh Valley R. R. Co.*, 183 Fed. Rep. 548; *Texas R. R. Comm'n* v. *A., T. & S. F. Ry. Co.*, 20 I. C. C. Rep. 463, 465; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290.

The Interstate Commerce Commission has nothing to do with prosecutions under the Anti-trust Act.

The United States may indict for unjust discriminations,

&c., in violation of the Interstate Commerce Act without the necessity of first having the Interstate Commerce Commission determine the legality or propriety of the acts complained of.

The Interstate Commerce Commission has powers as between carriers and shippers but not as between the United States and carriers or shippers.

Different rules govern applications by shippers for relief in the courts from those governing the United States. (*a*) In the light of reason. (*b*) The provisions of the statute. (*c*) Under the authorities.

For suits between private parties see *Atlantic Coast Line* v. *Macon Grocery Co.*, 166 Fed. Rep. 206; *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Columbus Iron Co.* v. *Kanawha Ry. Co.*, 171 Fed. Rep. 713; *Houston Coal Co.* v. *N. & W. Ry. Co.*, 171 Fed. Rep. 723; *Jewett Bros.* v. *C., M. & St. P. Ry. Co.*, 156 Fed. Rep. 160; *Kiser Co.* v. *Central of Ga. Ry. Co.*, 158 Fed. Rep. 193; *No. Pac. Ry. Co.* v. *Pacific Coast &c. Ass'n*, 165 Fed. Rep. 1; *Proctor & Gamble* v. *United States*, 225 U. S. 282; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Union Pacific R. R. Co.* v. *Oregon & Wash. Ass'n*, 165 Fed. Rep. 13; *Wickwire Steel Co.* v. *N. Y. C. & H. R. R. Co.*, 181 Fed. Rep. 316.

As to prosecutions by the United States see *Armour Packing Co.* v. *United States*, 209 U. S. 56; *A., T. & S. F. Ry. Co.* v. *United States*, 170 Fed. Rep. 250; *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558; *S. C.*, 212 U. S. 563; *Chicago, St. P. &c. Ry. Co.* v. *United States*, 162 Fed. Rep. 835; *C., B. & Q. Ry. Co.* v. *United States*, 209 U. S. 90; *Great Nor. Ry. Co.* v. *United States*, 208 U. S. 452; *L. V. R. R. Co.* v. *United States*, 188 Fed. Rep. 879; *N. Y. Central* v. *United States*, 212 U. S. 481, 500; *Standard Oil Co.* v. *United States*, 179 Fed. Rep. 614; *United States* v. *B. & O. R. Co.*, 153 Fed. Rep. 997; *United*

States v. *Great Nor. R. Co.*, 157 Fed. Rep. 288; *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. Rep. 234; *United States* v. *Mer. & Min. &c. Co.*, 187 Fed. Rep. 363; *United States* v. *Miller*, 223 U. S. 599; *United States* v. *P. & R. Ry. Co.*, 184 Fed Rep. 543; *United States* v. *Sunday Creek Co.*, 194 Fed. Rep. 252; *United States* v. *Texas & Pac.*, 185 Fed. Rep. 820; *Wight* v. *United States*, 167 U. S. 512; *Wisconsin Cent.* v. *United States*, 169 Fed. Rep. 76.

Mr. W. H. Bogle, with whom *Mr. Carrol B. Graves*, *Mr. W. B. Stratton*, *Mr. Ira Bronson*, *Mr. Morven Thompson* and *Mr. Bruce C. Shorts* were on the brief, for defendants in error:

Under the provisions of the act of March 2, 1907, the questions for review are only those arising from the decision of the court below in construing the statutes upon which the indictment is founded.

Holding that the indictment did not sufficiently specify the acts of the individual defendants which were relied upon as constituting a participation by them in the offense charged, or in aiding or assisting therein is not a construction of either the conspiracy statute, upon which that count of the indictment was founded, or of the Interstate Commerce Act, the violation of which was the crime which the defendants were alleged to have conspired to commit. The ruling of the court below sustaining the demurrer as to count 6 was based upon general principles of criminal pleading, and is not reviewable under this writ. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190.

Neither of the acts charged in the indictment, nor the two combined, amounts to undue restraint of trade or monopoly, under the Anti-trust Act, or undue discrimination under the Interstate Commerce Act.

The Pacific and Arctic Railway & Navigation Com-

pany was constructed and operated from the international boundary line to Skagway. It was under no legal duty to assume any obligations whatever with respect of the carriage of either freight or passengers by water between Skagway and the southern ports. If it voluntarily assumed any obligations for carriage beyond its own line, it had the legal right at its own discretion to select the agencies beyond its own line for which it would be responsible. Under the principles of common law, it had this absolute right, and could enter into an agreement for through routing and through rating with one connecting carrier and refuse to enter into any such agreement with any other connecting carrier. *A., T. & S. F. R. Co.* v. *D. &c. Co.*, 110 U. S. 667; *S. P. R. Co.* v. *I. Com. Comm.*, 200 U. S. 536; *Interstate Com. Comm.* v. *N. P. Co.*, 216 U. S. 538; *St. Louis Drayage Co.* v. *L. & N. R. R.*, 65 Fed. Rep. 39; *O. S. L. Co.* v. *N. P. R. Co.*, 51 Fed. Rep. 465; *C. & N. W. Co.* v. *Osborne*, 52 Fed. Rep. 912; *P. & S. Co.* v. *A., T. & S. F. Co.*, 73 Fed. Rep. 438; *G., C. & S. R. Co.* v. *S. S. Co.*, 86 Fed. Rep. 407; *Central Stock Yards Co.* v. *L. & N. R. Co.*, 118 Fed. Rep. 113.

The provision in § 1 of the Commerce Act requiring carriers to establish through routes and just and reasonable rates applicable thereto, does not require a carrier to establish through routes with all connecting carriers. So long as reasonable through routes are established the obligation imposed is complied with.

This clause in § 1 standing alone, is not capable of particular enforcement, and it must be read in connection with § 15. Two carriers cannot establish a through route unless they can agree upon the terms and conditions, and upon the amount and division of the through rate. The failure of carriers to come to terms of agreement cannot be made a criminal offense under § 10 of the Commerce Act or under the Sherman Act. *Cardiff Coal Co.* v. *C., M. & St. P. R. Co.*, 13 I. C. C. Rep. 460. There

was no legal duty upon the carrier to make a through routing agreement with any particular connecting carrier, until the Interstate Commerce Commission, after a hearing, had in the first instance determined that such a through route was required by the public interest, and ordered its establishment. *Interstate Com. Comm.* v. *N. P. Co.*, 216 U. S. 538.

The indictment in this case does not allege that any particular agreement for through routing was ever presented to the railway company by any other connecting carrier than the defendants, nor does it allege upon what terms and conditions the railway should have contracted, nor indicate in any way how the defendant railway company was to be protected against the additional obligations resulting from a through routing with such carrier.

It is intended by the Interstate Commerce Act that the question, when and under what circumstances a through route should be established between any two particular connecting carriers (in the absence of voluntary agreement between them), and upon what terms and conditions such through route should be established, was committed in the first instance exclusively to the determination of the Interstate Commerce Commission pursuant to the provisions of § 15 of the act; that the courts could not, in either a civil or criminal proceeding, determine in the first instance and in the absence of action by the Commission, whether a through route as between any two specified connecting carriers was or was not required by the public interest; and that in the absence of any action by the Commission, an allegation that a carrier entered into a through routing agreement with one connecting carrier and refused to make such agreement with any other carrier, cannot be held to be undue discrimination under the Commerce Act, or undue restraint of trade under the Anti-trust Act. *Tex. & Pac. Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. Co.* v.

Pitcairn Coal Co., 215 U. S. 482; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282.

The establishment or non-establishment of a through route in a given instance is administrative in its nature, and the determination of the necessity for its establishment is, in the first instance, committed exclusively to the judgment of the Commission by § 15 of the act.

The construction of the indictment by the court below, showing a difference in conditions under which different wharfage rates were charged, is binding upon this court. *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Winslow*, 227 U. S. 202.

The reasonableness of the wharfage rate on local shipments, and the reasonableness of the difference in the rate on local and on through-routed shipments, are questions for the solution of which there is no certain or fixed standard, and upon which different men might reasonably reach different conclusions. To make criminality depend, not upon facts, but upon the view of a jury as to the reasonableness of rates, is contrary to fundamental principles. *Tozier* v. *United States*, 52 Fed. Rep. 917; *Van Patten* v. *C., M. & St. P. Ry. Co.*, 81 Fed. Rep. 545.

While it is alleged that the lines from Skagway to Dawson were under one and the same management and operated as one continuous line, it is not alleged that the defendant railroad company or any of the other defendants had any interest in or control over or participated in the operation of either of the three foreign lines.

The laws of the United States cannot make it either criminal or wrongful for the owners of a foreign railroad to refuse to enter into traffic agreements with any other carrier whether located within or without the United States, and involving a carriage in such foreign country. It is not and cannot be criminal or wrongful for the

defendant railway company or its officers to refuse to extend through-routing privileges over railroads and steamship lines owned and operated by other corporations in a foreign country. Neither the defendants nor the Interstate Commerce Commission itself had any power to establish through-routing and through-rating over these foreign lines without the consent of the owners and operators of such foreign lines. Our laws cannot be extended so as to control or affect foreign carriage. *Am. Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

The acts charged against the defendants were lawful at common law, and are not forbidden by the Interstate Commerce Act; it cannot, therefore, be held that they constitute either undue restraint of trade or undue discrimination. The refusal by the railroad company to give to the Humboldt Steamship Company, or any other company, privileges which it was under no legal obligation to give, and to which such other company was not legally entitled, cannot be made the basis of a charge of either undue discrimination or undue restraint of trade. *A. J. & F. S.* v. *Tiedt*, 196 Fed. Rep. 349; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Gamble-Robinson Co.* v. *Railroad*, 168 Fed. Rep. 161; *G., C. & S. R. Co.* v. *Miami Steamship Co.*, 86 Fed. Rep. 407.

With respect to counts 1 and 2, the allegations of the indictment are too general and indefinite.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The District Court said that it was "without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment in either a criminal or civil proceeding," until the matters of discrimination between carriers or shippers or the giving or refusing of joint traffic arrangements "have been submitted to

and passed on by the Interstate Commerce Commission." For this conclusion the court relied on *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 427, and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 492.

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver, (southern ports) to Skagway (the entire wharfage facilities being owned by The North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon River; (3) thence by boat down the Yukon River to Dawson, etc., (called the northern ports). The route is designated as the White Pass and Yukon Route and is constituted of (a) The Pacific and Arctic Railway and Navigation Company, a West Virginia corporation; (b) The British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (c) The British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (d) The British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as "the railroad company" and own the only line of transportation between the wharf at Skagway and the Yukon River.

By mutual agreement between the defendant steamship companies, the Wharves Company and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

By agreement between the defendants the railroad refused to make any through route or joint rates with the Humboldt Company, or with any of the independent steamship lines, and refused to bill freight or passengers from the United States to Yukon River points, or reversely, except by ships belonging to one of the defendant companies.

By agreement between the defendants the railroad fixed so-called local rates between Skagway and the Yukon River points, which rates were very much higher than the railroad's pro rata of the through rate.

The Wharves Company charged $2.00 a ton for freight if shipped on a vessel not owned by one of the defendant companies. If so shipped and consigned to one who had entered into, or was about to enter into a contract to have all of his shipments so carried, the wharfage charge was only $1.00. Wharfage charges in excess of $1.00 are unreasonably high.

As a result of the agreement, shippers were compelled to use only the ships of the defendant steamship companies, as in that way alone could lower through rates be obtained. Competition in water transportation was destroyed between the defendant steamship companies and the independent lines, defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Company was discriminated against in the matter of through rates. These agreements between the defendant companies are alleged to be (count 1) for the purpose of eliminating competition from the business of transportation between the United States and Alaska; (second count) to monopolize such business; (counts 3, 4 and 5) to discriminate against the Humboldt Company. Count 6 we omit from consideration for the present.

The charges of the indictment may be even further concentrated and attention directed to these elements: The

defendant steamship lines and the Humboldt and independent lines from the United States to Skagway, the wharf at Skagway and the railroad from Skagway to the Yukon River points. The only possibility of competition is in the water part of this route. This controlled, the entire transportation is controlled; and to this control the action of the defendants was directed, the means of control being an agreement between the defendants to throw all the trade into the hands of the defendant steamship companies by the railroad company establishing through route and joint rates with them and refusing to do so with the Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective and cut out the Humboldt line and the independent lines as factors in the routes of transportation between the United States and the Yukon River points. Is the scheme illegal?

This is asserted by the Government and denied by the defendants. The court below, if we take some parts of its decisions, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the Anti-trust Act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted by defendants. They say that as the court held that in order to constitute restraint of trade or monopolization of trade under the Anti-trust Act the act charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through route agreements by a common carrier with one or more connecting carriers

and the refusal to make such agreements with other connecting carriers was not unlawful either at common law or by the Interstate Commerce Act, and the court held, therefore, that such act did not constitute restraint within the meaning of the Anti-trust Act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the Anti-trust Law, of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. *Swift & Co.* v. *United States*, 196 U. S. 375, 396. We do not pause to justify this conclusion, either by the general purpose of the act or by its adjudged applications. Its general purpose has been elaborately set forth in very recent cases; and particular instances of its application, pertinent to the case at bar and illustrative of it, are exhibited by *Swift & Co.* v. *United States*, *supra*, and *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20. In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercise by the Anti-trust Act. In those cases, as here, the purpose (the

means being different) was the prevention or destruction of competition, and the agreements here are exactly adapted to the purpose. Not the railroad only but the Wharves Company as well is charged to be in the combination. It was intermediate the railroad and the steamship lines and discriminated in its wharfage charge, it is alleged, to aid in the purpose of the combination, and, to complete and make effective the purpose, the local rates from Skagway to Yukon points were made greater than that part of the through transportation.

Whether $2.00 per ton (the rate charged to independent lines as against $1.00 per ton charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co.* v. *United States, supra*), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the Anti-trust Act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that as part of the transportation route was outside of the United States the Anti-trust Law does not apply. The consequences and, indeed, legal impossibility are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that

our laws cannot be extended so as to control or affect the foreign carriage." This is but saying that laws have no extra-territorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad) and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

The ruling of the District Court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the District Court upon counts 3, 4 and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The District Court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the Interstate Commerce Act, but gives the Commission the control and practical determination of

the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict." If, it is asked further, the finding of the Commission is to have either *prima facie* or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the Sixth Amendment of the Constitution? The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the District Court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would in our judgment be an erroneous view to take that the great problems which

the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

The District Court sustained count 6, against the demurrer of the corporate defendants, but held its averments were not sufficient to connect the individual defendants with the offense charged. This is a construction of the indictment and not subject to review.

It is urged by the individual defendants that the objection is applicable to the other counts of the indictment and that the court would have undoubtedly so ruled but for its construction of the Anti-trust Act, and it is also urged that in case of reversal of the court's decision upon the construction of the act it be permitted to pass upon such of the grounds of demurrer as were not passed upon in the former ruling. We yield to the request, and the more readily as the Government does not express great confidence in the sufficiency of the indictment. Its final contention is that the judgment of the District Court be reversed, with instructions "to pass on the sufficiency of the indictment without regard to the action or non-action of the Interstate Commerce Commission."

The judgment is therefore reversed as to counts 1 and 2 and the case remanded with instructions to proceed in accordance with this opinion.